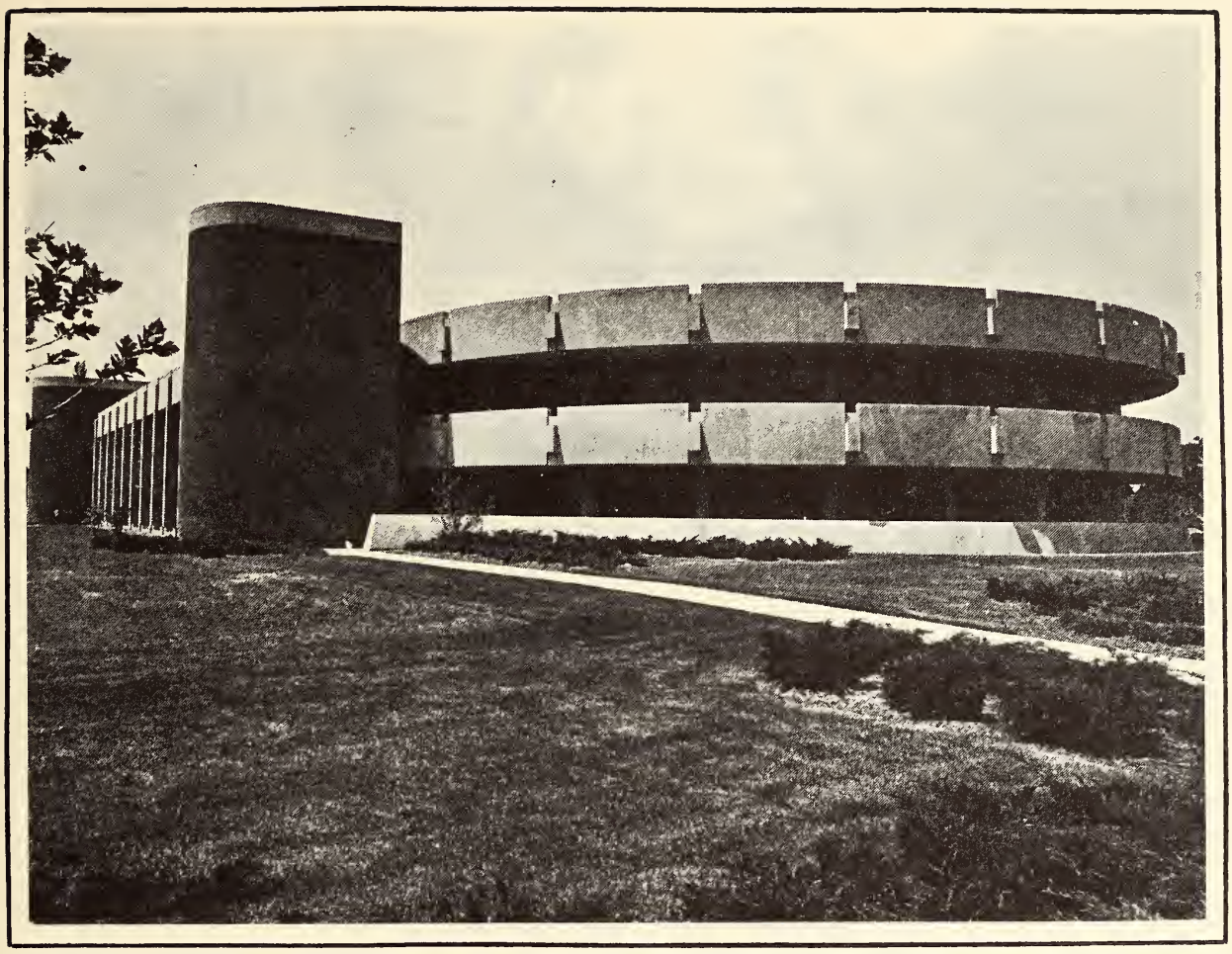
Indiana Law Review

Volume 19 No. 3 1986



Please enter my subscription to the INDIANA LAW REVIEW

NAME _____

ADDRESS _____

_____

_____

Enclosed is $_____ for ____ subscriptions.

Bill me for _____ subscriptions.

Mail to:

INDIANA LAW REVIEW
INDIANA UNIVERSITY
SCHOOL OF LAW—INDIANAPOLIS
735 West New York Street
Indianapolis, Indiana 46202

Subscription Rates (one year):

Regular, $18.00; Foreign, $21.50; Survey, $10.00;
Single Issue, $5.00

Indiana Law Review

Volume 19 **1986** **Number 3**

TABLE OF CONTENTS

Article

Notes

Volume 19 Fall 1986 Number 3

The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility thereof. Subscription rates: one year $18.00; foreign $21.50. Please notify us one month in advance of any change in address and include both old and new addresses with zip codes to ensure delivery of all issues. Send all correspondence to Editorial Assistant, Indiana Law Review, Indiana University School of Law—Indianapolis, 735 West New York Street, Indianapolis, Indiana 46202. Publication office: 735 West New York Street, Indianapolis, Indiana 46202. Second class postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, 735 West New York Street, Indianapolis, Indiana 46202.

Indiana Law Review

Volume 19 1986

Indiana University School of Law—Indianapolis

1985-86 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

John W. Ryan, *Ph.D., President of the University*
Glenn W. Irwin, Jr., *M.D., Vice-President*
Gerald L. Bepko, *LL.M., Dean*
James F. Bindley, *J.D., Assistant Dean for Administration*
G. Kent Frandsen, *J.D., Associate Dean for Student Affairs*
Jeffrey W. Grove, *J.D., Associate Dean for Academic Affairs*

Faculty

Thomas B. Allington, *Professor. B.S., University of Nebraska, 1964; J.D., 1966; LL.M., New York University, 1971.*

Edward P. Archer, *Professor. B.M.E., Rensselaer Polytechnic Institute, 1958; J.D., Georgetown University, 1962; LL.M., 1964.*

James F. Bailey, III., *Associate Professor and Director of Law Library. A.B., University of Michigan, 1961; J.D., 1964; M.A.L.S., 1970.*

Gerald L. Bepko, *Dean and Professor. B.S., Northern Illinois University, 1962; J.D., IIT/Chicago-Kent College of Law, 1965; LL.M., Yale University 1972.*

James F. Bindley, *Assistant Dean for Administration and Lecturer in Law. B.A., Loyola University, 1969; J.D., University of Kentucky, 1972.*

Paul N. Cox, *Visiting Professor. B.S., Utah State University, 1971; J.D., University of Utah, 1974; LL.M., University of Virginia, 1980.*

Clyde Harrison Crockett, *Professor. A.B., University of Texas, 1962; J.D., 1965; LL.M., University of London (The London School of Economics and Political Science), 1972.*

Debra A. Falender, *Professor. A.B., Mount Holyoke College, 1970; J.D., Indiana University, 1975.*

G. Kent Frandsen, *Associate Dean for Student Affairs and Associate Professor. B.S., Bradley University, 1950; J.D., Indiana University, 1965.*

David A. Funk, *Professor. A.B., College of Wooster, 1949; J.D., Case Western Reserve University, 1951; M.A., The Ohio State University 1968; LL.M., Case Western Reserve University, 1972; LL.M., Columbia University, 1973.*

Paul J. Galanti, *Professor. A.B., Bowdoin College, 1960; J.D., University of Chicago, 1963.*

Helen P. Garfield, *Professor. B.S.J., Northwestern University, 1945; J.D., University of Colorado, 1967.*

Harold Greenberg, *Associate Professor. A.B., Temple University, 1959; J.D., University of Pennsylvania, 1962.*

Jeffrey W. Grove, *Associate Dean for Academic Affairs and Professor. A.B., Juniata College, 1965; J.D., George Washington University, 1969.*

William F. Harvey, *Carl M. Gray Professor of Law. A.B., University of Missouri, 1954; J.D., Georgetown University, 1959; LL.M., 1961.*

W. William Hodes, *Professor. A.B., Harvard College 1966; J.D., Rutgers Newark, 1969.*

Lawrence A. Jegen, III., *Thomas F. Sheehan Professor of Tax Law and Policy, 1982. A.B., Beloit College, 1956; J.D., The University of Michigan 1959; M.B.A., 1960, LL.M., New York University, 1963.*

Henry C. Karlson, *Professor. A.B., University of Illinois, 1965; J.D., 1968; LL.M., 1977.*

William Andrew Kerr, *Professor. A.B., West Virginia University, 1955. J.D., 1957, LL.M., Harvard University, 1958; B.D., Duke University, 1968.*

Eleanor D. Kinney, *Assistant Professor. A.B., Duke University, 1969; M.A., University of Chicago, 1970; J.D., Duke University, 1973.*

Walter W. Krieger, *Associate Professor. A.B., Bellarmine College, 1959; J.D., University of Louisville, 1962; LL.M., George Washington University, 1969.*

David P. Leonard, *Associate Professor. B.A., University of California at San Diego, 1974; J.D., UCLA School of Law, 1977.*

Robin Paul Malloy, *Assistant Professor. B.S., Purdue University, 1971; J.D., University of Florida, 1980; LL.M., University of Illinois, 1983.*

William E. Marsh, *Professor. B.S., University of Nebraska, 1965; J.D., 1958.*

Susanah M. Mead, *Associate Professor. B.A., Smith College, 1969; J.D., Indiana University, 1976.*

Mary H. Mitchell, *Associate Professor. A.B., Butler University, 1975; J.D., Cornell Law School, 1978.*

David R. Papke, *Associate Professor. A.B., Harvard College, 1969; J.D., Yale Law School, 1973; M.A. in American Studies, Yale University, 1973; M. Phil., in American Studies, The University of Michigan, 1980; Ph.D., 1983.*

David E. Pierce, *Assistant Professor of Law. B.A., Pittsburgh State University, 1974; J.D., Washburn University, 1977; LL.M., University of Utah, 1982.*

Ronald W. Polston, *Professor. B.S., Eastern Illinois University, 1953; LL.B., University of Illinois, 1958.*

Kenneth M. Stroud, *Professor. A.B., Indiana University, 1958; J.D., 1961.*

James W. Torke, *Professor. B.S., University of Wisconsin, 1963; J.D., 1968.*

James Patrick White, *Professor (on special assignment). A.B., University of Iowa, 1953; J.D., 1956; LL.M., George Washington University, 1959.*

Lawrence P. Wilkins, *Professor. B.A., The Ohio State University, 1968; J.D., Capital University Law School, 1973; LL.M., University of Texas School of Law, 1974.*

Mary Wolf, *Visiting Assistant Professor of Law, B.A., Saint Xavier College, 1969; J.D., University of Iowa College of Law, 1974.*

Harold R. Woodard, *Professorial Lecturer. B.S., Harvard University, 1933; J.D., 1936.*

Emeriti

Agnes P. Barrett, *Associate Professor Emeritus. B.S., Indiana University, 1942; J.D., 1964.*

Cleon H. Foust, *Professor Emeritus. A.B., Wabash College, 1928; J.D., University of Arizona, 1933.*

John S. Grimes, *Professor Jurisprudence Emeritus. A.B., Indiana University. 1929; J.D., 1931.*

Melvin C. Poland, *Cleon H. Foust Professor of Law Emeritus, B.S. Kansas State University, 1940; LL.B., Washburn University, 1949; LL.M., The University of Michigan, 1950.*

R. Bruce Townsend, *Cleon H. Foust Professor of Law Emeritus, A.B., Coe College, 1938; J.D., University of Iowa, 1940.*

Legal Writing Instructors

Jeffrey Been, *A.B., Wabash College, 1981; J.D., Indiana University, 1984.*

Michael Mullett, *Lecturer. B.A., University of Michigan, 1966; M.A., 1973; J.D., Indiana University, 1982.*

Vickie Renfrow, *Lecturer. B.A., University of Northern Iowa, 1970; M.A., 1971; Ph.D., Indiana University, Bloomington, 1976; J.D., Indiana University, Bloomington, 1981.*

Joan Ruhtenberg, *Lecturer. B.A., Mississippi University for Women, 1959; J.D., Indiana University, 1980.*

Law Library Staff

Terri Lea Hardin, *Affiliate Librarian, B.A., Indiana University, 1982; M.L.S., 1983.*

Mary P. Hudson, *Assistant Librarian, B.A., Ball State, 1969; M.L.S., Indiana Universtiy, 1973.*

Wendell E. Johnting, *Technical Services Librarian. A.B., Taylor University, 1974; M.L.S., Indiana University, 1975.*

Constance Matts, *Associate Librarian. B.A., 1973, Case Western Reserve University; M.S.L.S., 1974, Case Western Reserve University; M.A.I.R., 1976, Creighton University.*

Kiyoshi Otsu, *Assistant Librarian, Parkland College, A.A., 1976; A.B., University of Illinois, 1980; M.S., 1982; C.A.S., 1983.*

Indiana Law Review

Volume 19 1986 Number 3

42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983

Jennifer A. Coleman*

I. Introduction

The forty-second Congress in very broad and general terms created a private cause of action to redress deprivations, under color of state law, of an individual's civil rights.[1] This cause of action is now codified at 42 U.S.C. section 1983.[2] Section 1983 is the civil counterpart of a provision passed in 1866 which created criminal penalties for the deprivation of constitutional rights under color of state law.[3] Both the Act of 1871 and the Civil Rights Act of 1866 vested federal courts with jurisdiction to determine violations of their respective provisions.[4]

Section 1983 is a very general provision:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[5]

Courts have been forced beyond the text of section 1983 in order to give

---

*Associate, Jaeckle, Fleischmann & Mugel, Buffalo, N.Y. B.A., St. Bonaventure University, 1981; J.D., Boston College Law School, 1985. The author gratefully acknowledges the support of her firm, and the assistance of Philip H. McIntyre, Dr. Edward Eckert and, especially, Professor Robert H. Smith in the preparation of this Article.

[1] Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871). For text of section 1 of the Ku Klux Klan Act of 1871, see *infra* text accompanying note 229.

[2] 42 U.S.C. § 1983 (1982).

[3] Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866). (See *infra* text accompanying notes 166-227 for a detailed description of the Civil Rights Act of 1866 and a listing of the current civil and criminal statutes that this Act gave rise to).

[4] *See infra* text accompanying notes 189-219 and 239-42.

[5] 42 U.S.C. § 1983 (1982).

content to its legislative command. The application or construction of section 1983 frequently involves extensive forays into the debates of the forty-second Congress and into the common law of 1871.[6] These judicial excursions into section 1983's history are largely inconclusive.

The following issues have been addressed by reference to the legislative debates of the forty-second Congress and the common law of 1871: the availability of immunity and good faith defenses,[7] exhaustion of administrative remedies,[8] availability of punitive damages,[9] and municipal liability.[10] In these cases, dissenting justices have consistently reached opposite results based on their own interpretation of section 1983's history.[11] Supreme Court majority and dissenting opinions, and their respective manipulations of section 1983's history, reveal that it is impossible to determine the majority of issues arising in modern civil rights litigation from section 1983's history.[12]

Purported reliance on section 1983's history is unsatisfactory. It provides little guidance to lower federal courts and obscures efforts to identify a process for the interpretation and application of section 1983. Supreme Court decisions may purport to rely on section 1983's history because the statute's language does not address many issues raised in contemporary section 1983 litigation. Section 1983's language is, in fact, deficient in many regards.

Although recourse to legislative history may be justified when the court construes the actual text of a statute, section 1983's terms received scant attention in the legislative debates. It was section three of the Ku Klux Klan Act of 1871, which engendered the most discussion and not section 1983's predecessor.[13] Thus, even when the Court must define section 1983's terms, there is little material in the Congressional Record with which to work.

In section 1983 cases, the issue often is not a matter of textual extrapolation; rather, courts are required to "fill the gaps" of section 1983. In such cases, the historical inquiry becomes even more tenuous and

---

[6]*See, e.g.*, Smith v. Wade, 461 U.S. 30 (1983); Monell v. Department of Social Services, 436 U.S. 658 (1978); Monroe v. Pape, 365 U.S. 167 (1961).

[7]Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutor immunity); Wood v. Strickland, 420 U.S. 308 (1975) (school official immunity); Pierson v. Ray, 386 U.S. 547 (1967) (judicial and police officer immunity); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislator immunity).

[8]Patsy v. Board of Regents, 457 U.S. 496 (1982).

[9]*Smith*, 461 U.S. 30; Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

[10]*Monell*, 436 U.S. 658; *Monroe*, 365 U.S. 167. These two decisions illustrate how completely polar results are possible when section 1983 construction rests on legislative history.

[11]*See, e.g.*, *Smith*, 461 U.S. at 65-68 (Rehnquist, J., dissenting).

[12]*Id.* at 92-93 (O'Connor, J., dissenting).

[13]Addickes v. S.H. Kress & Co., 398 U.S. 144, 187 (1970) (Brennan, J., dissenting); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1340 (1952).

murky. The Supreme Court has embraced the common law of 1871 as a means to fill the gaps of section 1983. For example, in *Smith v. Wade*,[14] the majority extensively cited pre-1871 precedent to demonstrate that punitive damages were available to redress reckless deprivations of civil rights. The dissenters referred to their own exhaustive list of pre-1871 case law to conclude the opposite.

The position of this Article is that history is an inadequate guide to the construction of section 1983. While history appears to be the touchstone in many cases, courts actually have been tremendously influenced by current developments in law and policy when applying section 1983. The debates of the forty-second Congress and the common law of 1871, despite their age, have shown themselves to be surprisingly malleable. Recitation of historical sources, although an effort to legitimize results, does not describe or further an interpretative process of section 1983.

Congress took steps to ensure that the civil rights acts would be applied as intended. In 1866, as part of its first civil rights legislation, Congress enacted what is now 42 U.S.C. section 1988, which prescribes a method for construing section 1983.[15] Section 1988 imposes a structure on the process of interpreting section 1983 which acknowledges state and federal law and which embraces developments in both.

Courts ruling on civil rights cases have applied section 1988 only sporadically. For example, section 1988 has been used to apply state statutes of limitations to section 1983 and to borrow state rules on the survival of claims. These cases have begun to develop a section 1988 doctrine. They have not, however, delineated when reliance on extrinsic aids to construe section 1983 should yield to the application of federal and state law pursuant to section 1988.

Section 1988 establishes a hierarchy for the borrowing of federal and state law in civil rights cases. Use of other federal law is limited to those cases where it is suitable to effect the purposes of section 1983. When there is no applicable or suitable federal law, state law must be used to fill the gaps in section 1983. Only state law that is inconsistent with section 1983 can be avoided.

At first blush, section 1988's directive to apply state law in federal civil rights actions may appear to be an inexplicable or unjustifiable prescription for the construction of federal civil rights law. Two professors have reacted to this aspect of section 1988. Professor Kreimer argued that section 1988 actually authorizes federal courts to fashion federal common law to fill the interstices of section 1983.[16] Professor Eisenberg argued

---

[14]461 U.S. 30.

[15]*See infra* note 152 for text of § 1988.

[16]Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601 (1985).

that section 1988 does not apply in the majority of section 1983 suits.[17] Both authors viewed the application of state law in federal civil rights cases as undermining national uniformity in the application of section 1983.[18]

It is this author's position that section 1988 requires the application of state law in civil rights cases. Section 1988's mandate cannot be circumvented by forcing an interpretation of section 1988 which either makes the section effectively inapplicable to section 1983 suits, as Eisenberg argues, or which views it as a mandate for extensive development of federal common law, based on the obsolete doctrine of *Swift v. Tyson*,[19] as Kreimer argues. To the extent that national uniformity is a legitimate policy concern in section 1983 actions it is not subverted by section 1988. Rather, section 1988 establishes that the purposes of section 1983 are the measures against which any law, state or federal, is to be considered before being applied in civil rights cases. A national threshold is thereby fixed as a matter of federal law to afford appropriate protection and vindication of individual rights. It is the position of this author that section 1988 embodies an astute political compromise which balances concerns for national uniformity and federalism while preserving and promoting the purposes of the civil rights acts.

The problem with the construction of section 1983 has been the total lack of direction or purposeful selection from among a number of elements, all of which are important in the interpretive process. This will be shown by surveying certain decisions of the Supreme Court of the United States. In its immunity decisions the Court has relied heavily upon history to construe section 1983. It has, however, quickly traversed the bounds of history in these cases and decided them by fashioning federal common law. In contrast, in its statute of limitations and survivorship cases the Court has applied section 1988. The section 1988 decisions stand in decided juxtaposition to the immunity cases. Rather than wade through history in the statute of limitations and survivorship cases, the Supreme Court has expressly determined that section 1983 is deficient and has turned to section 1988 as a guide to other sources of law.

The point of departure between these two lines of cases is a determination that section 1983 is or is not deficient. History and section 1983 are distorted in the immunity cases, because the Court has avoided the conclusion that section 1983 is in fact deficient. In its statute of limitations and survivorship cases, however, the Court has concluded that section 1983 is deficient and has applied section 1988.

---

[17]Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980).

[18]*Id.* at 516-18; Kreimer, *supra* note 16, at 632.

[19]41 U.S. (16 Pet.) 1 (1842).

II. The Problem of Statutory Construction of Section 1983

A. Monroe v. Pape—*The Debate Is Launched*

From 1871 through 1961 and the Supreme Court's decision in *Monroe v. Pape*,[20] section 1983 did not generate much federal court activity.[21] *Monroe* was a watershed section 1983 decision. Therein, the Supreme Court construed section 1983's "under color of" state law language broadly, holding that conduct in violation of section 1983 by a person clothed with the authority of the state, was conduct "under color of" state law even if the conduct itself was inconsistent with or contrary to state procedures or rules.[22] Justice Douglas, author of the majority opinion, relied heavily on the debates of the forty-second Congress and section 1983's parallels to section two of the Civil Rights Act of 1866[23] to argue that a broad construction was required to effectuate section 1983's overriding purposes.[24]

Monroe provided the arena for the Supreme Court's first attempt to identify and articulate section 1983's fundamental purposes.[25] The Court determined that through section 1983 Congress intended to provide a federal remedy in federal court because state courts had not adequately protected civil rights, to fashion a broad remedial provision that would deter future violations of civil rights, and to provide a remedy that was supplemental to remedies available under state law.[26]

Monroe breathed new life into section 1983 and, simultaneously, initiated its erratic interpretation. Comparison of the majority opinion by Justice Douglas with Justice Frankfurter's dissent exposes the seeds of confusion. Justice Douglas maintained that *stare decisis* compelled that the construction of "under color of" state law espoused in prior cases[27]

---

[20]365 U.S. 167 (1961).

[21]*See* Comment, *The Civil Rights Act: Emergence of an Adequate Civil Remedy?*, 26 Ind. L.J. 361, 363-66 (1951) (discussion of cases arising under statutory predecessors to section 1983 prior to 1920); *see also* Note, *The Proper Scope of the Civil Rights Acts*, 66 Harv. L. Rev. 1285, 1285 n.1 (1953). "Between 1961 and 1977 the number of cases filed in federal court under the civil rights statutes increased from 296-13,113." Maine v. Thiboutot, 448 U.S. 1, 27 n.16 (1980) (Powell, J., dissenting).

[22]*Monroe*, 365 U.S. at 187.

[23]Section 2 of the Civil Rights Act of 1866 was the prototype for section 1 of the Ku Klux Klan Act of 1871. *Monroe*, 365 U.S. at 185. *See infra* text accompanying notes 186 and 234.

[24]*Monroe*, 365 U.S. at 171-87. Justice Douglas also concluded that section 1983's reference to "person[s]" did not include municipalities. *Id.* at 191.

[25]*See supra* text accompanying notes 80-97.

[26]*Monroe*, 365 U.S. at 173-74.

[27]Screws v. United States, 325 U.S. 91, 108 (1945); United States v. Classics, 313 U.S. 299, 325-26 (1940) (Supreme Court concluded that conduct by a person cloaked with the authority of the state was taken "under color of" state law even though it may have been unauthorized and even contrary to the law of the state).

apply to that language in section 1983.[28] Justice Douglas also relied upon the legislative debates to support the conclusion that section 1983 was to be broadly construed.[29] Justice Frankfurter, in dissent, would have subjugated principles of *stare decisis* to policies of federalism.[30] Rather than addressing the issue anew, he would have found that section 1983 only reached action authorized by state law.[31] This view was based on Justice Frankfurter's reading of section 1983's legislative history.

Monroe set the stage for the ensuing confusion over the construction of section 1983. The issues joined by majority and dissent were the importance of history, the relevance of parallels between section 1983 and other civil rights acts (notably the Act of 1866), the importance and role of federalism in construing section 1983, the role of legal developments subsequent to the enactment of section 1983,[32] the role of *stare decisis*,[33] and the need to construe section 1983 so that its purposes were accomplished. Subsequent cases indicate that an acceptable accommodation of these often competing values has yet to be achieved.[34]

Problems of statutory construction arise in many contexts, and viewpoints on the subject are legion.[35] While in the abstract there may be

---

[28]*Monroe*, 365 U.S. at 185-86.

[29]*Id.* at 180-84.

[30]*Id.* at 220-22 (Frankfurter, J., dissenting).

[31]*Id.* at 237 (Frankfurter, J., dissenting).

[32]*Monroe* stated expressly that section 1983 was to be read against the backdrop of tort law. *Id.* at 187.

[33]In Maine v. Thiboutot, 448 U.S. 1 (1980), Justice Powell argued for a diminished role for *stare decisis* in section 1983 cases because he did not wish to perpetuate a broad construction of section 1983. *Id.* at 33 (Powell, J., dissenting).

[34]Federalism values may or may not outweigh the purposes of section 1983. *See, e.g.*, Fair Assessment In Real Estate Ass'n v. McNary, 454 U.S. 100 (1981). *Stare decisis* will or will not yield to the purposes of section 1983. *Compare Monroe*, 365 U.S. at 186-87 *with Monell*, 436 U.S. at 695.

[35]*See* Beaney, *Civil Liberties and Statutory Construction*, 8 J. PUB. L. 66 (1959); Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 SO. CAL. L. REV. 1 (1965); Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947); Dickerson, *Statutory Interpretation: Core Meaning and Marginal Uncertainty*, 29 MO. L. REV. 1 (1964); Dickerson, *Symposium on Judicial Law Making in Relation to Statutes*, 36 IND. L.J. 411 (1961); Frankfurter, *A Symposium on Statutory Construction*, 3 VAND. L. REV. 365 (1950); Gaylord, *An Approach to Statutory Construction*, 5 S.W. L. REV. 349 (1974); Johnstone, *Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1 (1954); Landis, *Statutes and the Sources of Law*, 2 HARV. J. ON LEGIS. 7 (1965); Mendelson, *Mr. Justice Frankfurter on the Construction of Statutes*, 43 CALIF. L. REV. 653 (1955); Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Radin, *Realism in Statutory Interpretation and Elsewhere*, 23 CALIF. L. REV. 156 (1935); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Note, *Statutes: Construction: The Legislative Silence Doctrine*, 43 CALIF. L. REV. 907 (1955); Note, *Statutory Construction—The Role of the Court*, 71 W. VA. L. REV. 382 (1969); Comment, *The Judicial Function in Statutory Construction*, 8 STAN. L. REV. 293 (1956).

so-called norms of construction,[36] no such abstract set of rules has been endorsed in the context of section 1983 interpretation. Rather than articulating a method of construction for section 1983, the Court has taken an *ad hoc* approach. A significant reason for the difficulties with construing section 1983 is that it and other Reconstruction Era provisions were drafted in general terms to effect highly controversial results.[37] These provisions did not form a comprehensive civil rights code; rather, they provided the superstructure by which an individual's civil rights could be protected.

Since *Monroe*, courts have relied heavily on history and the debates of the forty-second Congress to construe section 1983. Invariably, long-dead senators and representatives are required to speak to the civil rights problems of the late twentieth century. These voices from the past, and the legal context of the passage of the Ku Klux Klan Act, are ostensibly deemed sufficient to fill in the gaps of section 1983 and to ferret out its "true" meaning. Closer inquiry reveals, however, that section 1983's history does not achieve so much.

As stated previously, there are objective rules of statutory construction; primary among such rules is plain meaning. If the plain meaning of a statute is ascertainable from its text, that meaning controls.[38] If the text is incapable of expressing a plain meaning, then the courts consider extrinsic sources to interpret the statute. Foremost among these extrinsic sources of law is legislative history. Supreme Court construction of section 1983 has become mired in history because the Court has repeatedly found, both expressly and implicitly, that the language of section 1983 is not capable of expressing plain meaning.

B. The Plain Meaning Rule

Section 1983 provides that "any person" who deprives another of her constitutional rights "under color of" state law is liable to that individual. Used in the conventional sense, the term "person" means all people and expresses no exception. This language, however, has been con-

---

[36] *See, e.g.*, HURST, DEALING WITH STATUTES (1982); 3 SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 72.01-72.08 (4th ed. 1974) (dealing specifically with civil rights statutes); STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING (2d ed. 1984); STATSKY, LEGISLATIVE ANALYSIS: HOW TO USE STATUTES AND REGULATIONS (1975).

[37] *See* Gressman, *supra* note 13, at 1337, 1340, 1357.

[38] *See, e.g.*, SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 194 (1857); Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). *But see* Lyman, *The Absurdity and Repugnancy of the Plain Meaning Rule of Interpretation*, 3 MAN. L.J. 53, 54 (1969); Merz, *The Meaninglessness of the Plain Meaning Rule*, 4 U. DAYTON L. REV. 31, 32 (1979); Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 196-99 (1983).

strued to include cities, which are not persons in the plain meaning of the word,[39] and to exclude judges[40] who are, in most cases, persons. Plain meaning in section 1983 cases has either been implicitly dismissed by its absence from reported decisions, or it has been expressly rejected. Justice Powell, for example, has forthrightly stated his view of the plain meaning rule in the context of section 1983 suits:

> Although plain meaning is always the starting point . . . this Court rarely ignores available aids to statutory construction . . . . We have recognized consistently that statutes are to be interpreted not only by a consideration of the words themselves, but by considering, as well, the content, the purposes of the law, and the circumstances under which the words were employed. . . .
>
> The rule is no different when the statute in question is derived from the civil rights legislation of the Reconstruction Era. Those statutes must be given the meaning and sweep dictated by "their origins and their language"—not their language alone. . . . When the language does not reflect what history reveals to have been the true legislative intent, we have readily construed the Civil Rights Acts to include words that Congress inadvertently omitted. . . . *Thus, "plain meaning" is too simplistic a guide to the construction of § 1983.*[41]

In short, the terms of section 1983 have become "terms of art;" they have been stripped of their plain meaning, if indeed they ever possessed such meaning.

Because the Court does not tarry long with "plain meaning" in section 1983 cases, history and the "battle of the string citations"[42] are resorted to almost immediately to construe section 1983's terms and fill in its gaps.[43]

---

[39]*See* Monell v. Department of Social Services, 436 U.S. 658 (1978).

[40]*See* Pierson v. Ray, 386 U.S. 547 (1967). See *infra* text accompanying notes 99-112 for a discussion of this case.

[41]Maine v. Thiboutot, 448 U.S. 1, 13-14 (1980) (Powell, J., dissenting) (emphasis added); *see also* Allen v. McCurry, 449 U.S. 90, 110 (1980) (Blackmun, J., dissenting); Addickes v. S.H. Kress & Co., 398 U.S. 144, 216-17 (1970) (section 1983's words must be related to its purposes; this is the only proper way to interpret the statute).

[42]Smith v. Wade, 411 U.S. 30, 93 (1983) (O'Conner, J., dissenting).

[43]On several occasions, the Supreme Court has taken the position that because section 1983 is a remedial statute, it ought to be broadly construed. *See* Wilson v. Garcia, 105 S. Ct. 1938 (1985); Owen v. City of Independence, 445 U.S. 622, 636 (1980); Quern v. Jordan, 440 U.S. 332, 357 (1979); *Monell*, 436 U.S. at 684-85. Broad construction is argued for on the basis of section 1983's relationship to the fourteenth amendment. Because section 1983 was enacted pursuant to section 5 of the fourteenth amendment, it has been argued that section 1983 must be given the same latitude in construction as is accorded the fourteenth amendment. *See Quern*, 440 U.S. at 351 n.3 (Brennan, J., concurring); Mitchum v. Foster,

C. Section 1983's History

Section 1983's history consists of the debates surrounding passage of the Ku Klux Klan Act of 1871, recorded in the 42nd Congressional Globe, and of the historical/legal backdrop in which section 1983 was enacted.

1. Legislative Debates.—Frequently, in section 1983 Supreme Court decisions, one sees extensive citation and quotation of text from the debates of the forty-second Congress. These debates are a highly unreliable source of law for the construction of section 1983 in the context of specific and often finely tuned issues. While the debates may provide a general understanding of the statute's overriding purposes and goals, they are far too incomplete and equivocal to be determinative of narrowly drawn problems of section 1983 application.

Debates concerning the Ku Klux Klan Act tended to focus upon section three of that act and also on the events transpiring in the Klan-dominated South.[44] Very little debate concerned section one, the predecessor to section 1983. Reconstruction of the South was a highly charged issue for the Congresses of the post-civil war era. Opposition to federal intervention in the relationship between southern governments and the freed slaves was intense. Many congressmen, both for and against federal involvement in Reconstruction, feared that a strong centralized government would derogate state autonomy.[45] Arguments for vesting the federal government with authority to enforce civil rights were equally passionate in light of the states' ineffectiveness in adequately protecting these rights.[46] On one level, the debate raged over the role of the federal government; on another, more personal level, the debate raged over radically differing views concerning the status of non-whites.

The text of the debates cannot be artificially severed from the then prevailing political climate. Both opponents and proponents of the Act may have overstated its perceived effects to win uncommitted votes. Their remarks cannot be taken wholly at face value. Furthermore, twentieth century readers cannot fully transport themselves beyond their own social

---

407 U.S. 225, 240 (1972); *Pierson*, 386 U.S. at 561 n.1 (Douglas, J., dissenting). This approach to section 1983 construction is frequently urged in the context of arguments for increasing the availability and scope of section 1983 remedies.

[44]*See Monell*, 436 U.S. at 665; *Addickes*, 398 U.S. at 215 (Brennan, J., concurring in part and dissenting in part); Gressman, *supra* note 13, at 1334.

[45]*See* CONG. GLOBE, 42nd Cong., 1st Sess. H.p. app. 46-47, 50 (remarks of Rep. Kerr); *id.* at 371-73 (remarks of Rep. Archer); *id.* at 86-87 (remarks of Rep. Storm); *id.* at S.p. app. 216-21 (remarks of Sen. Thurman).

[46]For recitations of the atrocities committed by the Ku Klux Klan in southern states during this period, see, *e.g.*, *Id.* at S.p. app. 154-60 (remarks of Sen. Sherman); *id.* at 107-09 (remarks of Sen. Pool); *id.* at H.p. app. 320-22 (remarks of Rep. Stoughton); *id.* at 78-79 (remarks of Rep. Perry); Message to Congress from President Grant, March 23, 1871, *id.* at S.p. app. 236.

and cultural environment into an era over a century past. The process of drawing meaning from the legislative debates is imbued with bias from the beginning.[47]

Reliance on these legislative debates attributes false omniscience to the actors in 1871 by allowing that these congressmen, themselves bound by their culture, provided for problems one hundred years hence.[48] A judge in 1986 must attempt to get into the mind of an 1871 legislator to determine what that legislator would have intended to do about a situation arising one hundred (plus) years in the future. While this is an interesting and possibly informative process, it cannot and should not be determinative.

The Court speaks of "a" legislative intent in these cases, suggesting that Congress, as a body, acted with a single mind in the passage of the bill and that its intent is discernible. In fact, the division in Congress, even among proponents or opponents to the Reconstruction legislation, was substantial. The claim that Congress acted with a single "intent" is a fiction.

The retrospective view of modern judges is further distorted by the fact that *stare decisis* requires the Court to accomodate precedent. The judge must not only attempt to discern what the debates mean, but she must also make them resonate with judicial precedent. Thus, history is made to be consistent with an ever expanding string of precedent, it becomes a vehicle for the construction of section 1983 and it loses its character as an objective source of law.

Absent conference reports or extensive debate concerning section one of the Ku Klux Klan Act, and in view of the problems discussed above, the legislative debates are not very helpful in the construction of section 1983.[49] While this position is not expressly adopted by the Supreme Court,

---

[47]" 'By viewing society's values through one's own spectacles . . . one can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported.' It isn't a matter of good or bad faith. Try as we will, we cannot escape the perspectives that come with our particular backgrounds and experiences." Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 771 (1982); *see also* J. ELY, DEMOCRACY AND DISTRUST 67 (1980); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 219 (1980) [hereinafter Brest, *Misconceived Quest*].

[48]"The act of translation required here is different in kind, for it involves the counterfactual and imaginary act of projecting the adopter's concepts and attitudes into a future they probably could not have envisioned. When the interpretator engages in this sort of projection, she is in a fantasy world more of her own than the adopter's making." Brest, *Misconceived Quest*, *supra* note 47, at 222. *Compare* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 753-68 (1982).

[49]In the words of Justice Brennan, "The 42nd Congress, of course, can no longer pronounce its meaning with unavoidable clarity." *Quern*, 440 U.S. at 365 (Brennan, J., concurring); *see also Owen*, 445 U.S. at 675-76 (Powell, J., dissenting).

it may be implied from the fact that the legislative debates are seldom, if ever, exclusively or primarily relied upon.[50]

2. The Common Law of 1871.—Usually, reliance on history manifests itself by recitation of the common law of 1871. Such references are supported by the argument that the drafters of section 1983 adopted or incorporated the common law of 1871 in section one of the Ku Klux Klan Act. Many Supreme Court decisions construing section 1983 rely on this common law when the text of section 1983 and its legislative debates are inconclusive.

In *Monell v. Department of Social Services*,[51] the Supreme Court overruled its conclusion in *Monroe* that municipalities were not "persons" and not liable under section 1983.[52] Justice Brennan's opinion, on behalf of six justices, first rejected *Monroe's* construction of the Ku Klux Klan Act's legislative history which had led to the conclusion that municipalities were not persons.[53] The *Monell* majority then considered the legal import of the word "person" in 1871. The Court noted that in 1871 municipalities had been treated as persons for purposes of diversity jurisdiction.[54] Reference was made to the remarks of Senator Bingham to illustrate that members of the forty-second Congress thought that municipalities were included in the term "persons."[55] Corporate law was shown to have conferred the status of "person" on municipalities in 1871.[56] Finally, reference was made to a prior definitional act of Congress which stated that the usual meaning of "person" included political bodies.[57] The majority was also influenced by subsequent developments in section 1983 adjudication and in tort law.[58]

---

[50]*See infra* text accompanying notes 98-148.

[51]436 U.S. 658 (1978).

[52]*Id.* at 701.

[53]An amendment, known as the Sherman Amendment, was proposed in connection with debate over the Ku Klux Klan Act of 1871. This amendment would have imposed liability on municipalities for damage caused as a result of riotous conduct within a city's territorial limits. The amendment was rejected; the debate emphasized that it would be unfair to hold cities accountable for the conduct of persons who might or might not be citizens. More importantly, the statute would have imposed an affirmative duty on cities to provide police protection necessary to prevent such riotous associations. This affirmative duty was viewed as too great an intrusion by Congress into the prerogatives of local government, and thus the Sherman Amendment was rejected. In Monroe v. Pape, the rejection of the Sherman Amendment was construed to reflect congressional disapproval of any municipal liability under those provisions of the Ku Klux Klan Act which had become law. 365 U.S. at 188-90. This same debate was subsequently reconstrued in *Monell* as reflecting only congressional apprehension that it lacked power to impose positive duties on local government to protect its citizens. *Monell*, 436 U.S. at 664-69.

[54]*Id.* at 681-82.

[55]*Id.* at 685 n.45. Nothing, however, in Senator Bingham's remarks is expressly on point.

[56]*Id.* at 687.

[57]*Id.* at 688. Act of Feb. 25, 1871, § 2, 16 Stat. 431 (1871).

[58]*Monell*, 436 U.S. at 698-700.

Reliance on 1871 common law in *Monell* and in other cases[59] is problematic. In most cases, it is impossible to identify *the* common law of 1871 concerning a given issue. Further, there is little justification for hamstringing modern courts by requiring them first to unearth 1871 common law and then to reach results based on such common law. By 1871, each state had its own legislative and judicial system and its own common law traditions. Federal courts were also generating common law.[60]

It is difficult to freeze the common law of 1871 in place and thereby derive a definitive pronouncement of *the* common law of 1871 on a particular subject. Such an historical, suspended animation of the common law, even if possible, would provide only a cross section, showing how different legal systems treated particular matters.[61] Especially with respect

---

[59]*See, e.g.*, Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-66 (1981); *Allen*, 449 U.S. at 97-99; *Owen*, 445 U.S. at 638-44; *Quern*, 440 U.S. at 343; *Pierson*, 386 U.S. at 553-55; *Tenney*, 341 U.S. at 376.

[60]The jurisprudence of 1871 included an idealized vision of the common law as a unitary, almost Platonic reality, to which all legal systems aspired and in which all systems participated. Regardless of territorial or jurisdictional limits, all courts were viewed in theory as adding to the development of a single body of common law. The Supreme Court acknowledged in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), that the various court systems actually had their own separate bodies of law, which often varied significantly from one jurisdiction to another. Pursuant to the Rules of Decision Act, Federal Judiciary Act of Sept. 24, 1789, codified at 28 U.S.C. § 725 (1982): "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." *Id.* Prior to *Erie*, federal courts applied only the statutory law of the state in which they resided; case law was not binding and federal courts could ignore state common law. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842). Recognition, however, that judges actually do make law led to the result in *Erie* that state decisional law was no less law than state statutes and hence had to be applied by federal courts in diversity actions. Justice Brandeis stated:

> The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is a "transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, . . . 'but law in the sense which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else . . .' the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."

Erie, 304 U.S. at 79 (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910)).

[61]But, the common law, by its nature, does not provide systematic treatment of issues. Rather a rule of law must be implied from a body of precedent which, to a greater or lesser degree, may be on point. Therefore, even if the court successfully accumulated all the decisions of any common law system prior to 1871 to see how they treated an issue, a court is likely to find that the exact issue was not answered authoritatively at all. Argument based on factual distinctions and argument based also on the need to change the law were, and are, always available in any given common law system.

to matters regarding the freed slaves and civil rights, unanimity among jurisdictions hardly existed. The failure of consensus among the several states over the most basic precepts of individual liberty was the impetus for the Civil Rights Act and renders illusory the view that the various common law systems held concurring views on many issues.[62]

In theory, per the reported jurisprudence of the day, a single, general common law existed and was participated in by all judicial tribunals, regardless of territorial boundaries. It is difficult to accept the proposition that the Reconstruction Era legislators operated under such a view given the tenaciousness with which they debated over preserving and protecting state law and state tribunals.[63]

Civil rights legislation was aimed precisely at divergent state law treatment of basic rights. Constitutional minimums were established[64] and federal law was enacted to enforce statutory and constitutional guarantees.[65] Whatever the common law of 1871 was, Congress supplanted it with the Reconstruction Era legislation. It hardly makes sense, therefore, to assume that this same legislative body incorporated static 1871 common law in its civil rights enactments.

Nowhere in the debates accompanying passage of the Ku Klux Klan Act of 1871 did members of Congress state that common law was incorporated into the 1871 Act. The Court has nevertheless attempted to deduce a rationale for implying such incorporation. The first premise in this deduction is typically a statement by the Court that a given legal position on the controverted issue existed in 1871.[66] Using *Monell* as an illustration, this would be stated: "Municipalities were treated as persons in 1871."[67] This premise is then supported by recitation of ancient cases interpreted as endorsing the conclusion. Recitation of contrary precedent to rebut the first premise invariably appears in dissenting opinions.[68]

After declaring the status of 1871 common law, the premise is added that the forty-second Congress must have known about the Court-identified common law rule. For example, again using *Monell*, the Court referred to the legislative debates to illustrate that a senator, Senator Bingham,

---

[62]While this is obviously true regarding matters expressly dealing with civil rights, it is also true of matters which, at first blush, did not deal expressly with civil rights. For example, matters relevant to contracts, land sales, and testifying in court often distinguished between whites and non-whites in operation. These varied among the several states.

[63]*See infra* text accompanying notes 212-222.

[64]U.S. CONST. amends. XII, XIV and XV.

[65]*See infra* text accompanying notes 149-242.

[66]Given the divergence of common law in 1871, it is possible to find support therein for almost any proposition. *See, e.g., Smith*, 461 U.S. 30, in which the majority and dissent each found abundant authority in 1871 common law for polar conclusions.

[67]*See supra* text accompanying notes 53-58.

[68]*See, e.g., Smith*, 461 U.S. at 60-64 n.3 (Rehnquist, J., dissenting); *Monell*, 436 U.S. at 720-24 (Rehnquist, J., dissenting).

probably knew that municipalities were treated as persons.[69] In *Carey v. Piphus*,[70] this argument for imputing legislative knowledge of 1871 common law took the following form: because many members of Congress were lawyers and because lawyers would presumably be familiar with the law of damages then existing, Congress in 1871 must have known about the rules concerning compensatory damages when it enacted the Ku Klux Klan Act.[71] On other occasions, congressional knowledge has been grounded on the Court's own sense of disbelief that members of the forty-second Congress could have intended something at variance with the law of 1871 as perceived by the Court.[72]

The members of Congress were representatives of different states, each of which claimed and fiercely defended a unique legal system and body of law. This fact alone makes suspect the proposition that Congress itself knew of a particular common law rule. Additionally, it is unlikely that the individual members of Congress even knew of, or contemplated, the myriad common law rules and impliedly assented to their incorporation into section 1983's predecessor.[73]

Despite these problems with the first two premises of the Supreme Court's justification for reliance on 1871 common law, the Court has repeatedly maintained that section 1983 incorporates this common law. Frequently this conclusion is stated thus: if Congress had meant to alter the common law rule as to a specific issue it would have done so expressly when enacting the Ku Klux Klan Act.[74] Occasionally, this conclusion is stated somewhat differently: because Congress did not address a particular issue in enacting the Civil Rights Act of 1871, the common law status of that matter in 1871 was not abrogated or affected by section 1983's predecessor.[75]

The real threat of such a process is that section 1983 may become shackled to obsolete common law doctrines.[76] Such a result can be and

---

[69]*Monell*, 436 U.S. at 685 n.45.

[70]435 U.S. 247 (1978).

[71]*Id.* at 255-56.

[72]*Owen*, 445 U.S. at 677 (Powell, J., dissenting); *Quern*, 440 U.S. at 343; *Monell*, 436 U.S. at 707 (Powell, J., concurring); *Pierson*, 386 U.S. at 554. It is interesting to note at this stage that even the Justices of the United States Supreme Court, with benefit of briefs and arguments on the subject of the common law of 1871 vis-a-vis specific topics, cannot agree. Nevertheless, there is continued insistence that the common legislator of 1871 knew what the common law of 1871 was regarding these often narrow points of law.

[73]*See infra* text accompanying notes 212-22.

[74]*See, e.g.*, *Monell*, 436 U.S. at 692-93 n.57; Scheuer v. Rhodes, 416 U.S. 232, 243-44 (1974); *Pierson*, 386 U.S. at 554-55; *Tenney*, 341 U.S. at 376.

[75]*See, e.g.*, *Newport*, 453 U.S. at 258-59; *Allen*, 449 U.S. at 98; *Owen*, 445 U.S. at 637; *Quern*, 440 U.S. at 343; *Monell*, 436 U.S. at 720 (Rehnquist, J., dissenting); *Carey*, 435 U.S. at 255-56. *But see Owen*, 445 U.S. at 676 (Powell, J., dissenting) (arguing that no inference may be drawn from congressional silence).

[76]For example, although punitive damages are now universally available in negligence

has been avoided in some cases, usually by propounding unconvincing arguments as to the status of a particular legal matter in 1871, or by application of a quasi-implied repeal analysis to conclude that the 1871 common law rule was simply too contrary to the purposes of section 1983 to be given effect.[77]

The common law history of section 1983, like the congressional debates of the forty-second Congress, is not a very reliable or legitimate source of law for section 1983. It is subject to considerable nuance and to contradictory arguments about meaning and relevance. Justice O'Connor stated this concisely in her dissent in *Smith v. Wade*, condemning the historical exegesis by both the majority and dissent therein:

> In interpreting § 1983, we have often looked to the common law as it existed in 1871, in the belief that, when Congress was silent on a point, it intended to adopt the principles of the common law with which it was familiar. . . . This approach makes sense when there was a generally prevailing rule of common law, for then it is reasonable to assume that Congressmen were familiar with that rule and imagined that it would cover the cause of action that they were creating. But when a significant split in authority existed, it strains credulity to argue that Congress simply assumed that one view rather than the other would govern. Particularly in a case like this one [punitive damages], in which those interpreting the common law of 1871 must resort to dictionaries in an attempt to translate the language of the late 19th century into terms that judges of the late 20th century can understand, . . . and in an area in which the courts of the earlier period frequently used inexact and contradictory language, . . . we cannot safely infer anything about congressional intent from the divided contemporaneous judicial opinions. The battle of the string citations can have no winner.[78]

The most valid conclusion that may be drawn from section 1983's history is that it is inconclusive in the majority of cases that have come before

---

actions, Justice Rehnquist, in Smith v. Wade, read 1871 common law as allowing the award of punitive damages only upon a showing of intentional conduct. Despite this dissonance with the modern view, Justice Rehnquist would have applied his version of the 1871 rule to section 1983. *Smith*, 461 U.S. at 87 (Rehnquist, J., dissenting). The majority in *Smith* also played the historical game and argued that intent was not required at 1871 common law. Significantly, however, the majority also considered post 1871 decisions in its opinion. *Id.* at 34-36.

[77] *Newport*, 453 U.S. at 258-59; *Carey*, 435 U.S. at 258; *Wood*, 420 U.S. at 317-18; *Scheuer*, 416 U.S. at 243-47; *Monroe*, 365 U.S. at 186-87.

[78] 461 U.S. at 92, 93 (O'Connor, J., dissenting).

the Supreme Court.[79] It can be expected to fare no better as civil rights litigation enters the twenty-first century.

D. The Purposes of Section 1983

Section 1983's fundamental purposes are those general goals which a majority of the forty-second Congress attempted to achieve via section one of the Ku Klux Klan Act of 1871. While pronouncements of section 1983's primary purposes are subject to some extent to the same critique as specific exegeses of legislative intent relative to narrow issues of section 1983 construction,[80] as broader, animating purposes, they are more readily distilled from the fact of the Act's passage, its language and the creation of federal liability and jurisdiction where none had previously existed. In addition to the fact that the extrapolation of section 1983's overriding purposes is a more primary task which relies on more readily apparent data than that previously discussed, there is also substantial, if not unanimous consent by the Court as to what these purposes are. Majority and dissent universally identify section 1983's fundamental purposes; however, the balance struck among them and the extent to which they are forced to yield to competing policies is hardly consistent from case to case.[81]

From the United States Supreme Court's section 1983 decisions, four basic purposes of section 1983 emerge:

1. Section 1983 Was Intended to Make a Federal Forum Available for the Vindication of Civil Rights.—Section one of the Ku Klux Klan Act of 1871 created a civil cause of action, subsequently codified as section 1983; it granted original jurisdiction to federal courts to determine

---

[79]*See* Patsy v. Board of Regents, 457 U.S. 496, 507 (1982); *Newport*, 453 U.S. at 266; *Owen*, 445 U.S. at 675; *Monell*, 436 U.S. at 675-76; *id.* at 719-20 (Rehnquist, J., dissenting); Wood v. Strickland, 420 U.S. 308, 316-17 n.8; *Monroe*, 365 U.S. at 193 (Harlan, J., concurring).

[80]*See supra* text accompanying notes 48-50.

[81]While the basic purposes of section 1983 are universally acknowledged, some members of the Court maintain that one or more of these purposes have been completely fulfilled and therefore that they should cease to be guides to construction. This is most apparent in cases raising issues of federal jurisdiction over section 1983 claims. Frequently, to support restricting access to federal courts, it is asserted that federal jurisdiction was granted solely because the state courts could not be trusted to protect civil rights, but that these courts are now fully capable of protecting these rights. Thus, it is argued, the purpose to provide a federal forum no longer has the same compelling force in modern litigation under section 1983. The result in cases arguing on this basis frequently is that federal jurisdiction over civil rights claims is undermined or given a restrictive interpretation. *See Allen*, 449 U.S. at 99; Huffman v. Pursue Ltd., 420 U.S. 592, 605-06 (1975); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 501 (1941). For cases wherein the purpose to provide a federal forum was given greater deference, see *Patsy*, 457 U.S. at 503; *Mitchum*, 407 U.S. at 239; England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964).

actions arising under the Act of 1871. This jurisdictional grant is now codified at 28 U.S.C. section 1343.[82] That the 1871 act was intended to create federal jurisdiction is beyond contention.[83]

2. Section 1983 Was Intended to Make Liable Persons Who Acted Under Color of State Law to Deprive Individuals of Their Civil Rights.— Prior to passage of section two of the Civil Rights Act of 1866[84] and section one of the Ku Klux Klan Act of 1871, persons clothed with the authority of the state could violate any individual's civil rights with impunity. Unless state courts intervened in such situations, which was especially unlikely in southern states, the aggrieved party was without recourse. Congressional efforts to remedy such injustice, begun by passage of section two of the Civil Rights Act of 1866, continued with enactment of section one of the Ku Klux Klan Act. The latter expressly made state officials answerable in federal court for conduct which violated federal law. Although the specific parameters of state officials' liability were not articulated in a comprehensive manner by either statute, the essential proposition that section 1983 was intended to render state actors accountable is clearly established.[85]

---

[82]28 U.S.C. § 1343 (1982) provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 1343 was relied upon frequently in section 1983 cases prior to the elimination of 28 U.S.C. section 1331's jurisdictional amount. Because federal question jurisdiction no longer requires a minimum amount in controversy, section 1983 actions are frequently brought pursuant to section 1331 as well as 1343.

[83]*See Patsy*, 457 U.S. at 503-04; Parratt v. Taylor, 451 U.S. 527-34 (1981); Preiser v. Rodriguez, 411 U.S. 475, 513-14 (1973) (Brennan, J., dissenting); *Mitchum*, 407 U.S. at 240-41; *England*, 375 U.S. at 415; McNeese v. Board of Education, 373 U.S. 668, 671-72 (1963); *Monroe*, 365 U.S. at 252-53 (Frankfurter, J., dissenting).

[84]Section 2 of the Civil Rights Act of 1866 created criminal sanctions against persons who acted under color of state law to deprive another of the rights enumerated in section 1 of that Act. Section 2 was the prototype for section 1 of the Ku Klux Klan Act of 1871, which created a private action for damages and other relief to redress the deprivation of constitutional rights. *See infra* text accompanying notes 178-88.

[85]*See Newport*, 453 U.S. at 259; *Monell*, 436 U.S. at 682; Imbler v. Pactman, 424 U.S. 409, 433 (1976) (White, J., concurring); *Scheuer*, 416 U.S. 243; *Monroe*, 365 U.S. at 172.

3. Section 1983 Was Intended to Alter the Balance of Power Between the State and the Federal Governments.—The grant of federal jurisdiction to federal courts to hear causes of action against officials of the states necessarily involved an alteration of power in the republic in favor of the federal government.[86] Like other grants of federal jurisdiction,[87] the creation of competency in the federal courts to enforce civil rights inserted the federal government—by operation of its legislative and judicial branches[88]—between the people and the states.[89] Further, in creating liability attaching to state officials, section 1983 superseded state laws that conferred sovereignty on such persons.[90] The interest of the state in immunizing its agents was forced to yield to the civil rights of the individual.

Without federal enforcement, the Civil Rights Acts and the Reconstruction Era amendments would have been without effect.[91] Post-Civil War legislatures established federal jurisdiction where there had been none and expressly provided for national enforcement of newly emerged rights. This national civil rights enforcement and vindication scheme was targeted exclusively at persons who acted pursuant to state authority. Necessarily,

---

[86]This balance of power between the state and federal government is known as federalism. *See* Gressman, *supra* note 13, at 1336.

[87]28 U.S.C. § 1331 (1982) (federal question jurisdiction); 28 U.S.C. § 1332 (1982) (federal diversity jurisdiction); *see also* 28 U.S.C. § 1441 (1982) (federal removal jurisdiction).

[88]It should be noted that the power of the executive was also brought to bear in this alteration of federalism. The Act of 1866 and the Act of 1871 clearly contemplated that when the Civil Rights Acts were not complied with by the states, the President could call out the militia and force the states to submit to these federal laws. *See* Civil Rights Act of 1866 § 9; Act of 1871, § 3. *See also* CONG. GLOBE, 39th Cong., 1st Sess., 476 (remarks of Sen. Trumbull). An amendment to delete this provision in the Act of 1866 was rejected by the Senate. *Id.* at 606. After the Act of 1866 was passed by the House of Representatives, on March 9, 1866, Mr. LeBlond, a vehement opponent to the bill noted what he perceived to be the Act's effect on federalism: "I desire to move to amend the title of the bill by making it read, 'A bill to abrogate the rights and break down the judicial system of the states.' " *Id.* at 1367. His comment was declared to be out of order. *Id.*

[89]The people of the United States enjoy dual citizenship. They are citizens of their respective states as well as national citizens. Gressman, *supra* note 13, at 1336.

[90]The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.", U.S. CONST. art. VI cl. 2. State law defenses are not available in federal suits alleging violations of federal law. The immunity cases, however, have served to bridge section 1983 with some state law defenses. *See infra* text accompanying notes 98-148.

[91]Regarding the Act of 1866, Mr. Wilson remarked in the House of Representatives: "If the states would all observe the rights of our citizens there would be no need of this bill . . . . But, sir, the practice of the states leaves us no avenue of escape, and we must do our duty by supplying the protection the states deny." CONG. GLOBE, 39th Cong., 1st Sess. 1117-18 (1866); *see also id.* at 600 (remarks of Sen. Trumbull); *id.* at 603 (remarks of Mr. Lane).

it involved an alteration of the balance of power in the republic affected by constitutional amendment and federal legislation.[92] The fact that section 1983 affected federalism to the derogation of state autonomy is clearly established.[93]

4. Section 1983 Was Intended to Deter the Violation of Civil Rights.—The Reconstruction Era congresses, by creating criminal[94] and civil[95] penalties for the violation of individual rights, erected a deterrent against future abrogations of those rights. Section 1983's deterrent purpose has proven influential in cases wherein the issue of damages is presented to a court. Courts have consistently determined that substantial monetary and injunctive relief is available in section 1983 actions because the availability of such damages creates an incentive for states to comply with civil rights laws and such relief deters violations.[96]

In all cases construing section 1983, the Court has weighed its result against these identifiable purposes of section 1983. Not only *has* the Court considered the purposes of section 1983 as, to some degree, controlling its interpretation of that statute; on a more theoretical level courts *should* be animated by section 1983's discernible purposes.[97] Any construction of section 1983 must accommodate its broadly stated goals.

---

[92]Section 2 of the thirteenth amendment was seen by some legislators as conferring upon Congress only the power necessary to eliminate slavery. Hence the constitutionality of the Civil Rights Act of 1866, which concededly did more than eliminate slavery, was questioned. *See* CONG. GLOBE, 39th Cong., 1st Sess. 479 (remarks of Sen. Cowan); *id.* at 576 (remarks of Sen. Davis); veto message of President Johnson, *id.* at 1681. To resolve this constitutional issue, section 5 of the fourteenth amendment was passed by Congress and adopted by the states in 1868. Congress thereby has broad power to legislate pursuant to the substantive provisions of the fourteenth amendment. The Act of 1866 was then reenacted pursuant to the fourteenth amendment in the Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144. The Ku Klux Klan Act was passed pursuant to section 5 of the fourteenth amendment.

[93]*See Patsy*, 457 U.S. at 503; *Allen*, 449 U.S. at 99; *Quern*, 440 U.S. at 342; *Mitchum*, 407 U.S. at 238-39, 242; Younger v. Harris, 401 U.S. 37, 62 (1971) (Douglas, J., dissenting).

[94]Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866). *See infra* text accompanying notes 178-88.

[95]Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871). *See infra* text accompanying notes 228-37.

[96]*See Smith*, 461 U.S. at 49; *Newport*, 453 U.S. at 268; *Mitchum*, 407 U.S. at 242; Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); *Carey*, 435 U.S. at 256-57. Also, in 1976 Congress passed the Civil Rights Attorney's Fees Act, which was added to 42 U.S.C. § 1988 by amendment in 1976. Motivating this legislation was the desire to make it easier for plaintiffs to bring meritorious civil rights actions and thereby deter violations under color of state law.

[97]Professor Fiss argues that the prescriptive force of a statute, i.e., the purpose for which it was created, should be "given concrete meaning and expression" through the process of adjudication. Fiss, *supra* note 48, at 751. He argues that courts should focus on what a statute was meant to do, its purpose, rather than statements by the legislators of the way things were at the time of its passage. This attention to a statute's prescriptive

E. Summary of Statutory Construction Problems

In *Monroe v. Pape*, the Supreme Court, without establishing a rule of construction for section 1983, established a model for such adjudication. The acknowledged elements in this interpretive process are: the history of section 1983—both congressional debates and the common law of 1871—and the purposes of section 1983. Plain meaning has little utility as a rule of construction in these cases. In addition, and without much elucidation, developments in law subsequent to 1871 are also considered. The latter are explored more fully in the next section of this article.

History is a very suspect springboard for resolution of modern questions of construction arising under section 1983. It is deficient and usually too tangential to be a fruitful source of law in these matters. Further, it is easily manipulated and attributes false omniscience and objectivity to the legislators of 1871.

The purposes of section 1983 are more legitimate as sources of law because they are capable of more objective ascertainment. The apparent consensus as to section 1983's fundamental purposes further affirms this legitimacy. However, as the next part of this Article will demonstrate, the

---

force lends objectivity to the process of adjudication by establishing the parameters for interpretation. "Bounded objectivity is the only kind of objectivity to which the law—or any interpretive activity—ever aspires and the only one about which we care. To insist on more, to search for the brooding omnipresence in the sky, is to create a false issue." *Id.* at 745-46. Professor Fiss argues that objectivity in construction is possible in this manner. He disagrees with advocates of the "nihilist" school whom he characterizes as insisting that there was no objective element in the interpretive process. Professor Brest responded to Professor Fiss by attempting to demonstrate that objectivity in interpretation is impossible because of the inability of a court to discern the intent behind statutes. Brest, *Misconceived Quest*, *supra* note 47, at 209-17. Even Professor Brest, however, acknowledges that moderate originalists, those "concerned with the framers' intent on a relatively abstract level of generality—abstract enough to permit the inference that it reflects a broad social consensus rather than notions peculiar to a handful of the adopters . . . ," have the best argument for objectivity. *Id.* at 214. Section 1988 places express bounds on courts in adjudicating section 1983 and expressly limits the respective roles of federal law, state law, and the purposes of section 1983 in application of that provision. *See infra*, discussion of section 1988's role, at text accompanying notes 313-70. *See generally* Dickerson, *Statutory Interpretation: A Peek into the Mind and Will of a Legislature*, 50 IND. L.J. 206 (1975); Horack, *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119 (1932); Howell, *Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute*, 47 VA. L. REV. 439 (1961); Johnson, *Retreat from the Common Law?: The Grudging Reception of Legislative History by American Appellate Courts in the Early Twentieth Century*, 1978 DET. C. L. REV. 413; Nunez, *THe Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination*, 9 CALIF. W. L. REV. 128 (1972); Richardson, *Judicial Law Making: Intent of Legislature vs. Literal Interpretation*, 39 KY. L.J. 79 (1951); Smith, *Legislative Intent: In Search of the Holy Grail*, 53 CAL. ST. B.J. 294 (1978); Sparkman, *Legislative History and the Interpretation of Laws*, 2 ALA. L. REV. 189 (1950); Comment, *Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court*, 25 CALIF. L. REV. 326 (1937).

Court has not been consistent in attaching importance to the purposes of section 1983 when accommodating those purposes to conflicting values and policies. Fulfillment of the purposes of section 1983 has been a measure against which decisions are evaluated rather than a source for results. Instead, history is emphasized as a primary source of law for section 1983 interpretation.

The next section of the Article demonstrates the use that has been made of section 1983's history and purposes. A review of some important section 1983 decisions shows that the Court has been tremendously influenced by policies and values quite distant from the legal horizon of 1871 and the purposes of section 1983. The immunity cases make it abundantly clear that section 1983 adjudication has involved the foregoing elements. What is lacking however is an articulation, as a matter of policy and process, of a method for the interaction of these various elements.

III. The Immunity Cases

In many, if not most, cases construing section 1983, the Supreme Court has undertaken a two-tiered approach to the application of section 1983. First, the Court has expressly scoured the history and purposes of section 1983 focusing on the debates and the common law of 1871 with only passing comment on the purposes of section 1983. Second, the Court has considered and been influenced by legal developments and policy considerations subsequent to section 1983. The Court has balanced the historical data against other policy considerations and has rendered decisions which are essentially federal common law decisions. The immunity cases provide the clearest examples of this *de facto* section 1983 analysis.[98]

A. Pierson v. Ray

A majority on the Supreme Court concluded in *Pierson v. Ray*[99] that judges were absolutely immune from liability under section 1983. Further, the Court concluded that police officers had a qualified, or "good faith," immunity from section 1983 liability.[100]

---

[98] *See* Note, *The Proper Scope of the Civil Rights Acts*, 66 Harv. L. Rev. 1285, 1295-96 & n.54 (1953).

[99] 386 U.S. 547 (1967).

[100] *Id.* at 555-57. The first of the major immunity decisions was Tenney v. Brandhove, 341 U.S. 367 (1951), which held that legislators, as a matter of political history, were absolutely immune from section 1983 liability for conduct relevant to their legislative function. Justice Frankfurter's opinion focused on art. 1, section 6 of the United States Constitution, the Speech and Debate Clause, to reason that he could not believe Congress in 1871 meant to impinge on the tradition of legislative immunity grounded in the Speech and Debate Clause. *Id.* at 373, 376. Justice Douglas dissented and argued that if and when the conduct of a legislator went beyond the federal law, that legislator should be liable under the Civil Rights Act. *Id.* at 383 (Douglas, J., dissenting).

Chief Justice Warren's majority opinion first deduced that judicial immunity was firmly established at common law in 1871: "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."[101] He then noted that "[t]he common law has never granted police officers an absolute and unqualified immunity."[102] While the question of judicial immunity was settled by the existence of an absolute immunity at common law in 1871, the non-existence of police officer immunity did not resolve that issue for the purposes of section 1983.

Instead of concluding that police officers were not immune because they were not immune in 1871, the Court fashioned a qualified immunity based on the "good faith" of the police officer. This good faith defense was dictated by the "prevailing view."[103] Chief Justice Warren referred to the Restatement of Torts[104] and to other twentieth century tort treatises and cases to argue that the good faith defense was generally available to police officers under modern tort law. Relying on the admonition in *Monroe* that section 1983 "should be read against the background of tort liability,"[105] the Court held that the defense of good faith "is also available to [police officers] in the action under § 1983."[106] Clearly, the creation of a good faith defense for police officers in section 1983 actions was not required by the plain meaning of section 1983 nor by its history.[107] Rather, the reasonableness of this modern defense to tort suits coupled with the belief in the "fairness" of the defense controlled.

Justice Douglas, dissenting, pointed out that the plain meaning of section 1983 allowed no defense of immunity in favor of judges or police officers.[108] He argued that section 1983 was a remedial statute which was to be broadly construed.[109] While Chief Justice Warren looked for express abrogation of judicial immunity by section 1983, Justice Douglas would have required express creation of such immunity.[110] Regarding the

---

[101] *Pierson*, 386 U.S. at 553-54. Chief Justice Warren cited Bradley v. Fischer, 80 U.S. (13 Wall.) 335 (1871), to show that judicial immunity existed at common law in 1871. *Bradley*, however, did not rely on common law decisions as much as on the functional requirement that judges be immune from liability for judicial conduct to assure the independence of the judiciary. *Id.* at 347. The emphasis on the requirement that coordinate branches of government function independently of each other was grounded on the notion of separation of powers.

[102] *Pierson*, 386 U.S. at 555.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 556.

[106] *Id.* at 557.

[107] Chief Justice Warren did not cite the legislative debates, but rather relied on the common law backdrop in which the 42nd Congress acted.

[108] *Id.* at 559 (Douglas, J., dissenting).

[109] *Id.* at 560-61 (Douglas, J., dissenting).

[110] *Id.* at 563 (Douglas, J., dissenting).

separation of powers argument, Justice Douglas responded that the federal legislature had power pursuant to section five of the fourteenth amendment to make state judges liable.[111] Although he argued that judges were liable for intentional conduct, he would nonetheless have allowed honest mistake as a defense.[112]

B. Scheuer v. Rhodes

Chief Justice Burger, writing for a unanimous Court,[113] concluded in *Scheuer v. Rhodes*[114] that state executive officers did not have an absolute immunity from section 1983 liability; like police officers, they had a good faith defense to such actions.[115] The decision briefly considered English common law which conferred an absolute immunity on the king and his chief officials; the Court noted that this immunity had been "gradually eroded."[116]

No attempt was made to determine 1871 rules pertaining to executive liability. Rather, Chief Justice Burger stated: "Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government as well as the purposes of 42 U.S.C. § 1983."[117] The Court created a doctrine of qualified immunity for executive officials based on the "prevailing view,"[118] and the implicit reasonableness of executive, qualified immunity.[119]

---

[111] *Id.* at 565 (Douglas, J., dissenting).

[112] *Id.* at 566 (Douglas, J., dissenting). In this regard, Justice Douglas was also motivated by concerns for fairness. Section 1983 does not require a showing of intent to establish liability.

[113] Justice Douglas took no part in the deliberations or decisions in the case.

[114] 416 U.S. 232 (1974).

[115] *Id.* at 247.

[116] *Id.* at 239 n.4.

[117] *Id.* at 243.

[118] *Id.* at 245.

[119] *Id.* at 246. The Court noted that executives were analogous to legislators and judges in support of the position that they should all enjoy some immunity. To the extent that judicial and legislative immunity was grounded on separation of powers principles, it is somewhat surprising that executives were not given a similar, absolute, immunity. It would seem that because the executive is the third coordinate branch of government, concerns for the independent functioning of the different branches of government would have compelled the same result vis-a-vis executive officials. The distinction lies in the fact that in *Tenney* and *Pierson*, the Court could point definitively to 1871 case law to support the immunity as pre-existing section 1983 and as not expressly abrogated by that statute. The Court, apparently, was not presented with such definitive case law regarding the status of executive liability in 1871. Instead, the Court fashioned a doctrine of qualified immunity for such officers based on its sense of fairness to such persons and the need to protect their offices while accommodating the purpose of section 1983 to make such persons liable. Also, given that judges and legislators were absolutely immune, conferral of similar protection against liability upon state executives could have seriously eroded section 1983's utility, for then there would have been virtually no one left who acted literally under color of state law.

While exercising common law powers and creating this defense, Chief Justice Burger did not go so far as to establish absolute immunity. He concluded, "[section] 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' "[120]

The Court in *Scheuer* balanced the systemic demand for an independent executive branch, unfettered by potential liability for its executive conduct,[121] against section 1983's purpose to " 'give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.' "[122]

C. Wood v. Strickland

Justice White's majority opinion in *Wood v. Strickland*[123] concluded that school boards had a limited good faith immunity from section 1983 liability. Only if the school board, through its members, knew or should have known that its conduct would violate constitutional rights, or if it acted with malicious intent, was it liable for damages in section 1983 actions.[124]

The Court's decision began by tracing the development of good faith immunity in section 1983 actions through its decisions in *Tenney v. Brandhove*, *Pierson*, and *Scheuer*. Rather than relying on the common law of 1871 or the legislative debates,[125] the Court stated, "Common law tradition, recognized in our prior decisions [which did not deal with school boards], and strong public-policy reasons also lead to a construction of § 1983 extending a qualified good-faith immunity to school board members from liability for damages under that section."[126]

The Court borrowed the rather superficial historical inquiries of *Pierson* and *Scheuer* regarding judicial and executive immunity to conclude that it was justified in granting some immunity to school boards. Primarily, the Court was motivated by concerns for reasonableness, fairness, and public policy:

---

[120] *Id.* at 248 (citation omitted).

[121] *Id.* at 241-42.

[122] *Id.* at 243 (citation omitted).

[123] 420 U.S. 308 (1975).

[124] *Id.* at 322.

[125] Justice White's opinion did not attempt to deduce specifically what the status of school board liability had been in 1871. Although he referred to state law decisions on this issue, all but one of the decisions he cited were post 1871 opinions. *Id.* at 318 n.9.

[126] *Id.* at 318.

> *Tenney v. Brandhove*, *Pierson v. Ray*, and *Scheuer v. Rhodes* drew upon a very similar background and were animated by a very similar judgment in construing § 1983. Absent legislative guidance, we now rely on those same sources in determining whether and to what extent school officials are immune from damage suits under § 1983. We think there must be a degree of immunity if the work of the schools is to go forward.[127]

The standard of good faith immunity created for school boards represents a judicial balancing of the systemic demand for independent functioning[128] against the remedial purposes of section 1983.[129]

Justice Powell dissented to the standard of qualified immunity created by the majority. Together with Chief Justice Burger and Justices Blackmun and Rehnquist, he would have granted school boards qualified immunity on par with executive officials as articulated in *Scheuer*.[130]

D. Imbler v. Pachtman

A majority of the Court concluded in *Imbler v. Pachtman*[131] that prosecutors enjoyed an absolute immunity from section 1983 liability for prosecutorial conduct. Justice Powell's majority opinion began by noting, "The statute [section 1983] . . . creates a species of tort liability that on its face admits of no immunities."[132] Next, his opinion established that the modern practice was to grant prosecutors absolute immunity for acts relevant to the initiation and prosecution of criminal proceedings.[133] Having established this "modern rule" of prosecutorial immunity, Justice Powell indicated that an historical inquiry was mandated by prior Supreme Court immunity decisions.[134] He noted: "The first American case to address the question of a prosecutor's amenability to such an action was *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896)."[135] Thus, to the

---

[127]*Id.* at 320-21.

[128]School boards do not constitute one of the three coordinate branches of government; therefore, separation of powers concerns are not directly implicated. But, analogous concerns for autonomy, and a tacit belief that independent functioning is preserved if concern for liability is minimized were considered in the decision.

[129]The Court said, "[A]ny lesser standard would deny much of the promise of section 1983." *Id.* at 322.

[130]*Id.* at 327-31 (Powell, J., dissenting).

[131]424 U.S. 409 (1976).

[132]*Id.* at 417.

[133]Justice Powell's authority for this modern rule was twentieth century, federal courts of appeal decisions. *Id.* at 420 n.16.

[134]*Id.* at 421. This historical inquiry is, somehow, seen as guarding against the exercise of judicial fiat in these cases. *Id.*

[135]*Id.*

extent Justice Powell felt obliged in *Imbler* to undertake a historical inquiry, it was launched from a post-1871 state court decision. This historical inquiry considered subsequent state and federal courts' treatment of the issue of prosecutorial liability.[136] Justice Powell then returned to the "well settled," modern, common law rule of prosecutorial immunity[137] and stated that the inquiry was "whether the same considerations of public policy that underlie the common law rule likewise countenance absolute immunity under § 1983."[138]

The majority in *Imbler* focused primarily on the heavy cost to the criminal justice system if prosecutors were potentially liable for conduct related to the performance of their jobs.[139] The majority never really considered the purposes of section 1983 as a counter-balance:

> [T]his immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.[140]

Anything less than absolute immunity for prosecutorial conduct in section 1983 suits was viewed as impairing the prosecutor's independent exercise of judgment and thus undermining the criminal justice system.[141]

Justice White, with Justices Brennan and Marshall, concurred that prosecutors had some immunity from suit, but disagreed that this immunity was absolute.[142] The concurrence considered the purposes of section 1983 and maintained that only qualified immunity should be available because absolute immunity denied the "promise of section 1983."[143] Justice White agreed with the majority that the integrity of the criminal justice system had to be preserved by clothing the prosecutor with absolute immunity regarding the decision to initiate criminal prosecution.[144] To rebut the majority's historical analysis, he referred to other common law deci-

---

[136] *Id.* at 422-24.

[137] *Id.* at 424.

[138] *Id.*

[139] *Id.* at 424-27.

[140] *Id.* at 427-28.

[141] The Court left open, however, the possibility that prosecutors may be criminally liable. *Id.* at 429.

[142] *Id.* at 434 (White, J., concurring).

[143] *Id.* (White, J., concurring).

[144] *Id.* at 438 (White, J., concurring). The concurrence also agreed with the majority that the prosecutor should be absolutely immune for damages arising from testimony that the prosecutor knew or should have known was false. *Id.* at 440 (White, J., concurring).

sions to show that this immunity went no further.[145] Justice White expressly rejected the proposition that the forty-second Congress incorporated into section 1983 all immunities existing at common law.[146] The concurring justices would have found that prosecutors were liable for the unconstitutional suppression of exculpatory evidence alleged in *Imbler*.[147]

E. Conclusions Regarding the Immunity Cases

The immunity decisions present a body of cases construing section 1983 wherein the elements involved in its interpretation are most clearly exposed for analysis. The elements that have informed the Court's construction in these cases are the common law, both historical and current, the legislative debates, consideration of public policy vis-a-vis the potential systemic costs of the Court's construction of section 1983, and the purposes of section 1983. The Court has not treated the express text of the statute, admitting of no immunities, as dispositive.

From case to case the balance struck among these factors in the construction of section 1983 varies. It is clear from the crazy-quilt interplay of policy, common law, and the purposes of section 1983 that the Court in the immunity cases has engaged in the creation of common law. Fashioning an extensive immunity doctrine, the Court has selectively chosen from the common law of 1871, modern tort law, public policy, and the purposes of section 1983. The Supreme Court has, implicitly and correctly, recognized that the legal horizon of 1871 and the language of section 1983 do not resolve the immunity issues and has sought guidance from developments in state and federal law and public policy. This typifies the process of construction used by the Supreme Court in its more significant decisions construing section 1983.[148]

---

[145] *Id.* at 437-41 (White, J., concurring). The concurrence, like the majority, referred to post 1871 case law.

[146] *Id.* at 441-42 (White, J., concurring).

[147] *Id.* at 443 (White, J., concurring); *see also* Smith v. Wade, 461 U.S. 30 (1983). "[I]n *Imbler* we recognized a common-law immunity that first came into existence 25 years after § 1983 was enacted." *Id.* at 35 n.2.

[148] While the immunity cases present the clearest example of this process of tacit acknowledgment of the deficiency of section 1983 and its legislative history and subsequent recourse to later developments in law and public policy, many Supreme Court decisions "construing" the language of section 1983 have engaged in a similar process. *See Patsy*, 457 U.S. at 513-14 (recitation of twentieth century decisions as being influential); *Newport*, 453 U.S. at 261-62 (recitation of post 1871 cases to support position that punitive damages were not available against a city in a section 1983 action); *Owen*, 445 U.S. at 657 (section 1983 opinions should reflect changes in notions of governmental responsibility over the last century); *Carey*, 435 U.S. at 255-57, 258 n.13 (common law of damages relevant to section 1983); Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975) (*Younger v. Harris* applied to section 1983 litigation in federal court); Moor v. County of Alameda, 411 U.S. 693, 703 (1973) (section 1988 allows consideration of evolving common law in section 1983 cases);

The next section of this article will discuss 42 U.S.C. section 1988 as a substitute for the relatively unguided interplay of history, policy and the purposes of section 1983 in these cases. Section 1988 accommodates all the factors previously identified as involved in the construction of section 1983 while providing a road map for their use. Section 1988 also justifies and limits the borrowing of contemporary developments in state and federal law.

IV. Section 1988 in Context

A. Introduction

When a court is called upon to adjudicate a matter that is not provided for in the text of section 1983 nor in its contemporaneous debates, the historical inquiry frequently becomes a search for the status of that issue at 1871 common law. Even when the court is arguably interpreting the specific language of the statute (for example the meaning of "person"),[149] it has been demonstrated that the inquiry is often more far-reaching than mere textual definition. Always, the result is informed by consideration of extrinsic policies.

The interplay of the elements in section 1983 construction differs from case to case without any apparent rhyme or reason resulting in virtually unbounded judicial creation of federal common law. This provides little guidance to lower courts attempting to deal with novel issues arising under section 1983.[150] It also gives appellate courts relatively unrestricted license continually to readjust the balance among the various elements in the interpretation of section 1983.

Originally enacted as section three of the Civil Rights Act of 1866,[151] section 1988 places boundaries on the exercise of judicial power in the construction of section 1983.[152] It prescribes a method of construction for section 1983.

Prieser v. Rodriguez, 411 U.S. 475, 485 (1973) (evolution in the law of habeas corpus is relevant to the historical inquiry); Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969) (section 1988 allows consideration of state law in construing section 1983); *Monroe*, 365 U.S. at 187 (section 1983 should be read against the background of tort liability).

[149]*See supra* text accompanying notes 39-40.

[150]Indeed, it is most important to focus on how trial courts deal with these issues because very few cases reach the appellate level.

[151]Entitled "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication," the Civil Rights Act of 1866 was passed by two-thirds vote of the House and Senate, overriding the veto of President Johnson. Cong. Globe, 39th Cong., 1st Sess. 196 (1866) (House of Representative's vote); 1809 (senate vote). Passage of the Civil Rights Act of 1866 followed closely upon the enactment of the thirteenth amendment and its ratification by the states. See 1 Schwartz, Statutory History of the United States—Civil Rights (1970), for a discussion of other major civil rights legislation during the Reconstruction Era.

[152]42 U.S.C. § 1988 (1982) provides:

> The jurisdiction in civil and criminal matters conferred on the district courts

It is the thesis of this article that section 1988 supplies a rule of statutory construction for section 1983.[153] Section 1988 directs that when section 1983 is deficient, the court should fill that gap with other applicable federal law, provided that such law serves the purposes of section 1983. If there is no applicable or suitable federal law, the court is directed to apply the law of the state where it sits, again, only if such law is consistent with the purposes of section 1983.[154]

The use of section 1988 as a rule of construction for section 1983 fosters uniformity in the protection of civil rights while according deference to state law.[155] It is the position of this author that section 1988 represents a compromise between uniformity and comity.[156] Recognition that section 1988 is a rule of construction for section 1983 is necessary to preserve this compromise. Section 1988 maintains the balance struck between state and federal power in the redefined federalism of the Reconstruction Era. By providing a congressionally mandated approach to the construction of section 1983, section 1988 also tempers policy-based excesses in the construction of section 1983.[157]

> by the provisions of this Title, and of Title "CIVIL RIGHTS" and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.] or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The latter part of 42 U.S.C. § 1988 is known as the Civil Rights Attorney's Fees Act. It was added to section 1988 by amendment in 1976.

[153]Arguably, it supplies a rule of construction for all civil rights legislation, both civil and criminal. The language of section 1988 states that all provisions under the title of "Civil Rights" in the United States Code are subject to its command.

[154]This tiered process of construction is described in detail *infra* at text accompanying notes 313-69.

[155]Both Professors Eisenberg and Kreimer apparently view national uniformity and section 1988's language to apply state law as mutually exclusive. This is not always the case—deference to one does not necessarily signal the demise of the other. Rather, it is the essence of compromise that competing interests co-exist by each making some sacrifice. Section 1988 is a congressionally mandated compromise which it is a court's responsibility to enforce.

[156]*See infra* discussion at text accompanying notes 209-24.

[157]"The question is whether we can insist that adjudication is an interpretive activity and still find that it possesses an objective character in the face of these differences. I think we can." Fiss, *supra* note 48, at 750-51. Justice Douglas is quoted as having said "With

The next section of this article discusses the Civil Rights Act of 1866 with special emphasis on the first three sections of that Act. Section three, predecessor to section 1988, was an important enforcement provision of the Act of 1866. The next section also discusses the original text of section one of the Ku Klux Klan Act, section 1983's predecessor. Section one of the Ku Klux Klan Act expressly incorporated the enforcement provisions of the Civil Rights Act of 1866.

Professors Kreimer and Eisenberg have both relied on historical arguments to urge that section three of the Act of 1866, and its directive to federal courts to apply state law, be narrowly construed.[158] Professor Kreimer argued that in 1866 the "common law" was understood to refer to a universal common law which was supplemented and modified by federal court judges who exercised general federal common law powers. Kreimer argued that section 1988's predecessor did not require that state decisional law be applied in civil rights cases because the statute's reference to "common law" invited federal courts to expound common law under the then existing doctrine of *Swift v. Tyson*.[159] Professor Eisenberg argued that section three, when viewed as part of the Act of 1866, only made sense when applied to actions commenced in state court and removed to federal court pursuant to a removal provision in the Act of 1866.[160]

It is the position of this author that the history and text of section three of the Act of 1866, and its subsequent enactment in the Ku Klux Klan Act, do not support such deviations from its apparently clear and expressed directive that state law be applied in federal civil rights actions.

B. The Civil Rights Act of 1866

1. Passage of the Act.—The Civil Rights Act of 1866 was passed over the presidential veto of Andrew Johnson.[161] Its passage, despite heated

---

five votes we can do anything." *Id.* at 758. Abuse comes in the manner in which the balance is struck between competing values in the adjudication of section 1983.

[158]Only a few other articles have dealt with section 1988. *See* Theis, Shaw v. Garrison: *Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681 (1976); Recent Developments, *Federal Civil Rights Act Incorporates State Wrongful Death and Survival Laws*, 14 STAN. L. REV. 386 (1962); Recent Decisions, *Civil Rights—Survival of Actions—Since Failure to Provide Suitable Remedy for Wrongful Death Renders Civil Rights Acts Deficient Within Meaning of 42 U.S.C. § 1988 (1958), State Survival Statute May Be Utilized to Enable Vindication of Abrogated Federally Guaranteed Civil Rights*, 47 VA. L. REV. 1241 (1961).

[159]*See* Kreimer, *supra* note 16, at 619-20.

[160]*See* Eisenberg, *supra* note 17 at 500.

[161]President Johnson vetoed the bill on March 27, 1866, and returned it to the Senate with exceptions. CONG. GLOBE, 39th Cong., 1st Sess., 1679-81 (1866). By a two-thirds vote of the Senate on April 6, 1866, and a two-thirds vote of the House of Representatives on April 9, 1866, the Civil Rights Act of 1866 became law. CONG. GLOBE, 39th Cong., 1st Sess., 1679-81, 1809 (1866).

debate in both houses of Congress and the lack of executive support, presaged the role the Congress would play in determining the course of Reconstruction and in protecting civil rights. Part of the impetus behind the Act of 1866 was that Congress disagreed with President Johnson's Reconstruction policies.[162]

Senate Bill No. 61 was introduced in the upper House by Senator Trumbull on January 5, 1866.[163] It was supported in both houses by Republicans who maintained that Congress possessed the power to interpose itself in state government and thereby remedy grossly inequitable circumstances which confronted the freed slaves. Democrats opposed the bill on its merits; however, their arguments were frequently couched in constitutional rhetoric.[164] Moderate Republicans provided the pivotal votes and offered the most interesting comments in the debates. These moderates clearly endorsed the Act of 1866's ends, but questioned whether Congress had constitutional authority to pass such a measure. Many of these individuals subsequently supported the legislation which lead to the fourteenth amendment.[165]

Whether Congress had power to pass the Civil Rights Act of 1866 rested on construction of the thirteenth amendment and its enabling sec-

---

[162]*See* discussion between Senator Wade and Senate Lane, *id.* at 1801-02. President Johnson is also the only American President to be impeached by Congress. This stemmed, in part, from intense opposition to his Reconstruction policies.

[163]*Id.* at 474. The original bill also sought to enact S. No. 60, The Freedmen's Bureau Bill, which had been vetoed by President Johnson. This veto was not overriden by Congress. In a twist of irony, which was probably intended, many provisions of the Civil Rights Act of 1866 were modeled on the Fugitive Slave Act of 1850, a statute whose constitutionality had been affirmed by the Supreme Court. *See id.* at 475, 500, 605, 1760.

[164]*See, e.g., id.* at 1120 (remarks of Rep. Rogers). He was fundamentally opposed to granting constitutional liberties to blacks. His arguments opposing S. No. 61, however, focused on the alleged lack of power to legislate in the manner implicated by the bill. Opponents challenged that Congress had no grant of power to declare that the freed slaves were citizens of the United States or the states, nor to tell the states how to deal with the freedmen in matters relevant to contracts, sales of real property, etc. *See infra* note 172.

[165]For example, Representative Bingham voted against S. No. 61 in the House of Representatives. *Id.* at 1367. He subsequently abstained on the vote to override President Johnson's veto. *Id.* at 1861. Subsequently he supported the bill that became the fourteenth amendment. Representative Thayer voted for S. No. 61 and also voted to override the veto. *Id.* at 1367, 1861. In debate, however, he indicated that a constitutional amendment would have been a more appropriate way to achieve the ends sought by S. No. 61. *Id.* at 1153. Representative Raymond expressed the same ambivalence over Congress' power to enact S. No. 61. *Id.* at 1266. He abstained on the vote of the bill in the House of Representatives and he voted against overriding the Presidential veto. *Id.* at 1367, 1861. Representative Shellabarger also questioned the constitutionality of S. No. 61, but he determined to vote for it nonetheless. *Id.* at 1293, 1367. He also voted to override the veto of President Johnson. *Id.* at 1861. Shellabarger was subsequently the House sponsor of the Ku Klux Klan Act of 1871. *See also id.* at 1719 (introduction of bill to protect all persons in their civil rights); *id.* at 1782-83 (remarks of Sen. Cowan).

tion.[166] Democrats and moderate Republicans maintained that the thirteenth amendment did no more than abolish slavery. They argued that Congress had authority under section two of the thirteenth amendment only to enact legislation necessary and proper to the eradication of slavery.[167]

The Act of 1866, however, granted the freedmen the right, on the same basis as whites, to contract, to buy and sell property, to sue and be sued, and to enjoy the same benefits of state laws.[168] This did not create new rights *per se*; rather, it required that if state law treated a white person in one manner respecting any of the enumerated issues, a black person was to receive the same treatment. This was aimed, among other things, at state criminal statutes which often imposed harsher punishment on non-whites and at property laws which treated blacks and whites differently. Because the Act would effectively strike down such discriminatory laws, some opponents saw it as superseding state criminal and civil law. Opponents of the bill refused to find that the thirteenth amendment provided constitutional authorization for such congressional abrogation of state law.[169] The perceived intrusion on the prerogatives of the states was viewed by the bill's opponents as making serious inroads into state power and as eroding the federalism scheme established by the framers of the Constitution.[170]

---

[166]U.S. CONST., amend. XIII, § 1, provides: "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Section 2 states, "Congress shall have power to enforce this article by appropriate legislation."

[167]*See* CONG. GLOBE, 39th Cong., 1st Sess., 476 (1866) (remarks of Sen. Saulsbury); *id.* at 479, 1784 (remarks of Sen. Cowan); *id.* at 576 (remarks of Sen. Davis); *id.* at 1156 (remarks of Rep. Thornton); *id.* at 1265 (remarks of Rep. Davis); *id.* at 1266 (remarks of Rep. Raymond); *id.* at 1292-93 (remarks of Rep. Bingham); *id.* at 1680 (veto message of President Johnson).

[168]*See infra* text accompanying notes 172-77.

[169]*See supra* note 164.

[170]*See* CONG. GLOBE, 39th Cong., 1st Sess. 47 (1866) (remarks of Sen. Saulsbury) ("Let us see whether this bill in its provisions is not a total subversion of the true theory and character of our federal system."); *id.* at 477 (remarks of Sen. Davis) ("As to everything not within the Federal jurisdiction the states are considered separate and foreign goverments."); *see also id.* at 603 (remarks of Sen. Cowan); *id.* at 1120 (remarks of Rep. Rogers) ("Congress is without power . . . to enter the domain of the state and interfere with its internal policy, statutes and domestic relations."); *id.* at 1154 (remarks of Rep. Eldridge) ("This bill is, it appears to me, one of the most insidious and dangerous of the various measures which have been directed against the interest of the people of this country. It is another of the measures designed to take away the essential rights of the states."); *see also id.* at 1156 (remarks of Rep. Thornton) (referred to James Madison for the idea that the federal government was very limited); *id.* at 1269 (remarks of Rep. Kerr) ("The right to exclude them ['Negroes' and 'Coolies'] or to limit them in their civil or political rights and privileges is fundamental and necessary to the state. It antedates all constitutions. It is original in the state."); *id.* at 1415 (remarks of Sen. Davis) ("If Congress has the power to regulate

2. Content of the Civil Rights Act of 1866.—This article will primarily focus on sections one, two and three of the Act of 1866.[171] Section one provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.[172]

---

the subjects which this bill assumes to regulate, it is but the beginning of a new and most important era of its legislation. There will, indeed, be a development of our system of government of which the fathers neither spoke or wrote, or which their sons never dreamed until the acme of the present great national fury."); *id.* at 1680 (veto message of President Johnson) ("Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the states. They all relate to the internal policy and economy of the respective states."); *id.* at 1777 (remarks of Sen. Johnson) ("The result, therefore, of the three provisions in this section is, that contrary to state constitutions and state laws, it converts a man that is not a citizen of a state into a citizen of the state, and it provides that his punishment shall only be such as the state laws impose upon white citizens. Where is the authority to do that? If it exists, it is still more obvious that the result is an entire annihilation of the power of the states.").

[171]Sections 4-8 are still in existence today, sections 9-10 have been repealed. See WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS Appendix at 44-49 (1970), for the subsequent histories of the various sections of the Act of 1866.

[172]Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866), reenacted, Act of May 31, 1870, c.114, sec. 16, 16 Stat. 144 (1870). The first part of section 1, declaring that all persons born in the United States were citizens of the United States (except un-taxed Indians) was added by amendment after the bill was introduced in the Senate from the Judiciary Committee. CONG. GLOBE, 39th Cong., 1st Sess., 498 (1866). The amendment was adopted by the Senate and became part of the bill on February 1, 1866. *Id.* at 575. There was considerable debate regarding this conferral of national citizenship. Several members of Congress argued that the legislature had no authority to naturalize the freed blacks. *See id.* at 497 (remarks of Sen. Van Winkle) (argued that only a constitutional amendment could grant such citizenship); *id.* at 479 (remarks of Sen. Cowan) (argued against the provision because he was concerned it would extend citizenship to everyone and not just the freedmen); *id.* at 523 (remarks of Sen. Davis) (argued that congressional power to naturalize extended only to European immigrants and not to freed blacks. His argument rested on a very narrow construction of article 1, § 8, cl. 4 of the Constitution which confers power on Congress to "establish a uniform rule of naturalization." He argued that this constitu-

First, section one conferred national citizenship on the freed blacks;[173] then it established that all citizens possessed the right to equal treatment. Proponents of the bill were careful to distinguish the civil right to equal treatment under state law, conferred by section one, from political and social rights; the right to vote, for example, was purposefully excluded from the bill.[174] Exclusion of the voting issue most likely reflected a political choice; whether the freed men were to be given the right to vote was an issue even more polarizing than issues raised by the Act of 1866.[175]

The latter portion of section one has survived and is codified at 42 U.S.C. sections 1981[176] and 1982.[177] Section 1981 guarantees the equal right to contract, give evidence, and receive equal benefit of law. Section 1982 guarantees equality in the purchase and sale of real and personal property.

Section two of the Civil Rights Act of 1866 provided:

> That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any

---

tional power extended only to foreigners, and since the freed blacks were not foreign born, they were not foreigners within the terms of the Constitution. *Id.* at 524). The purpose of this provision in section 1 of the Act of 1866 was to reverse congressionally the decision in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). This language was subsequently incorporated in H.R. No. 63, which, when adopted and ratified, became the fourteenth amendment. *See* SCHWARTZ, *supra* note 151, at 255-56. For text of the fourteenth amendment, see *infra* note 235.

[173]Some members of Congress argued that section 1 merely declared what already existed in fact, that blacks were citizens of the United States by virtue of their birth in the United States. *See* CONG. GLOBE, 39th Cong., 1st Sess., 569 (1866) (remarks of Sen. Merrill); *id.* at 1291 (remarks of Sen. Bingham). The western Indians were excepted from this section because of the desire of Senator Trumbull not to have the Indian question "embarrass" the bill. *Id.* at 527 (remarks of Sen. Trumbull).

[174]Many members of Congress distinguished between civil and political rights and understood expressly that section 1 did not encompass the right to vote. *See id.* at 1159 (remarks of Rep. Windom); *id.* at 1117 (remarks of Rep. Wilson, House sponsor of the bill).

[175]The right to vote was conferred subsequently on black males by the fifteenth amendment to the United States Constitution. "Section 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST., Amend. XV §§ 1 and 2.

[176]42 U.S.C. § 1981 (1982) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[177]42 U.S.C. § 1982 (1982) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

> inhabitant of any State or Territory to the deprivation of any right secured or protected by this Act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding $1,000, or imprisonment not exceeding one year, or both, in the discretion of the court.[178]

This provision created a criminal sanction in the event a person's section one right to equal treatment under state law was violated. Primarily aimed at the judiciary and exclusively targeted at agents of the state, this section provoked intense debate in both houses of Congress.[179] Because this section imposed federal criminal penalties on state actors who enforced unequal state laws, it was viewed by the bill's opponents as nullifying the criminal, property, and domestic relations laws of the states.[180]

Just as it is possible to distill general or basic purposes animating the passage of the Ku Klux Klan Act of 1871,[181] it is evident that the thirty-ninth Congress, by enacting section two, meant to target state court judges for liability.[182] Section two has survived and is codified at 28 U.S.C.

---

[178]Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866).

[179]*See* remarks of Senator Eldridge, opponent of the bill, who stated that without any doubt section 2 was aimed at the state judiciary. CONG. GLOBE, 39th Cong., 1st Sess., 1155 (1866) (remarks of Sen. Eldridge). Representative Raymond, proponent of the bill, stated he was concerned about the constitutional power of Congress to punish state judges in the manner prescribed by section 2. *Id.* at 1267 (remarks of Rep. Raymond). Representative Bingham, opponent of the bill, stated that Congress could not make it a crime for state judges to follow state law. *Id.* at 1293 (remarks of Rep. Bingham). (Rep. Bingham advocated creation of a direct civil remedy versus a criminal penalty. *Id.* at 1295). The veto message of President Johnson, *id.* at 1680, stated that section 2 was an unconstitutional infringement on the state judiciary, legislature and ministerial officers. Senator Trumbull stated that legislators who passed discriminatory state laws would not be liable under section 2; rather, judges who acted with "vicious will," i.e. knowingly enforced discriminatory state law, would be liable. *Id.* at 1758 (remarks of Sen. Trumbull). Senator Johnson stated that section 2 usurped the power, independence and integrity of state judges. *Id.* at 1778 (remarks of Sen. Johnson). In response, Representative Lawrence stated, "I answer that it is better to invade the judicial power of the state than permit it to invade, strike down and destroy the civil rights of citizens." *Id.* at 1837 (remarks of Rep. Lawrence). Representative Miller, proponent of the bill, moved to amend section 2 and add that state judges acting in accord with state law would be immune from section 2 liability. *Id.* at 1156 (remarks of Rep. Miller). This amendment was not adopted.

[180]*See* CONG. GLOBE, 39th Cong., 1st Sess. 1156 (1866).

[181]*See supra* text accompanying notes 80-97.

[182]Compare the decision in Pierson v. Ray, 386 U.S. 547 (1967), discussed *supra* text accompanying notes 99-112. In *Pierson*, the Court concluded that no legal developments prior to 1871 suggested that anything but absolute immunity was contemplated by the United

section 242.[183] Judicial immunity is no defense to claims brought pursuant to section 242.[184]

Section two of the Civil Rights Act of 1866 did not create a private remedy for individuals whose section one rights were violated.[185] It served, rather, as the predecessor and prototype for section one of the Ku Klux Klan Act.[186] Section 1983 is the civil extension of section two of the Act of 1866[187] and is drafted in substantially the same terms as section two.[188]

Federal civil rights legislation is significantly indebted to the first two sections of the Act of 1866. These sections have, through modification and reenactment, become the backbone of contemporary civil rights law: the fourteenth amendment and sections 1981, 1982, and 1983. Due to its

---

States Congress when it enacted section 1983's predecessor in 1871. On the contrary, however, section 2, the prototype for section 1983, demonstrates that Congress, in debate, expressly contemplated the liability of state court judges pursuant to that provision. *See supra* note 179.

[183]18 U.S.C. § 242 (1982) provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Section 2 of the Civil Rights Act of 1866, the predecessor of 18 U.S.C. § 242, was held to be constitutionally valid in *Ex Parte* Yarbrough, 110 U.S. 651 (1884), and reaffirmed in Motes v. United States, 178 U.S. 458 (1900). *See also* United States v. Shafer, 384 F. Supp. 483 (D. Ohio 1974) (withstood a vagueness attack). 18 U.S.C. § 242 was adjudicated in Screws v. United States, 325 U.S. 91 (1945).

[184]*See* United States v. Ramey, 336 F.2d 512 (4th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965). *But see* United States v. Chalpin, 54 F. Supp. 926 (S.D. Cal. 1944) (§ 242 not applicable to judges acting in their official capacity).

[185]Two congressmen advocated the creation of a civil remedy because that was viewed as potentially more effective in redressing the wrong than the criminal penalty, which did not compensate the victim of the discrimination. Representative Bingham proposed amending section 2 to create a civil cause of action. CONG. GLOBE, 39th Cong., 1st Sess., 1295 (1866) (remarks of Rep. Bingham); *id.* at 1805 (remarks of Sen. Doolittle). Section 242 has been construed to foreclose a private cause of action. *See* United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980); Pawelek v. Paramount Studios Corp., 571 F. Supp. 700 (N.D. Ill. 1983); Powell v. Kopman, 511 F. Supp. 700 (S.D. N.Y. 1981). Sections 1981 and 1982, however, derived from section one of the Act of 1866, have been construed to allow for a private damages action in conjunction with section 1983 and 28 U.S.C. §§ 1343 and 1331.

[186]*See Schwartz*, *supra* note 151, at 591.

[187]*See Monroe*, 365 U.S. at 185; CONG. GLOBE, 42nd Cong., 1st Sess., 68 (1871) (remarks of Rep. Shellabarger, House sponsor of the Ku Klux Klan Act of 1871); Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last*: Jones v. Alfred H. Mayer Co., 55 VA. L. REV. 272 (1969).

[188]See *infra* text accompanying note 229 for the text of section 1 of the Ku Klux Klan Act of 1871, the predecessor of section 1983.

pervasive influence, it is necessary to understand the policies behind the Act of 1866, the issues joined in the congressional debates, and the challenges raised to the Act's passage.

Section three of the Civil Rights Act of 1866, the predecessor to 42 U.S.C. section 1988, provided for enforcement of the first two substantive sections of the Act.[189] Section three began:

> *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this Act. . . .[190]

This is essentially a preamble to the Act's enforcement provisions which declared that the federal courts were the only courts with competency to hear and determine violations of the Civil Rights Act of 1866. Exclusive jurisdiction reflected a fundamental distrust of the state judiciaries; state courts were denied a role in the vindication of rights under the Act.[191]

Although section one of the Act did not create a civil remedy, sections 1981 and 1982,[192] together with 28 U.S.C. sections 1343[193] and 1331[194] have been construed to create a private right of action and civil remedies. Federal jurisdiction in such cases, however, has been held non-exclusive.[195] Jurisdiction over the criminal civil rights provision, section 242, the heir

---

[189]Sections 3-10 of the Act of 1866 were enforcement provisions relevant to sections 1 and 2. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1119 (1866) (remarks of Rep. Wilson, House sponsor); *id.* at 1151 (remarks of Rep. Thayer).

[190]Act of 1866, ch. 31 § 3 (1866).

[191]*See supra* note 179.

[192]*See supra* notes 176-77 and accompanying text.

[193]See *supra* note 82 for discussion and text of section 1343. Section 1343 is derived from section 1 of the Ku Klux Klan Act of 1871. *See infra* notes 239-42 and accompanying text.

[194]28 U.S.C. § 1331 (1982) provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Prior to 1980, there was a $10,000 jurisdictional amount required under section 1331. When this was omitted by amendment, federal question jurisdiction formed the basis of many civil rights suits because these *arose* under the laws of the United States. Civil actions pursuant to sections 1981-1983 may, therefore, be brought under section 1331 or section 1343.

[195]For cases concluding that 28 U.S.C. § 1343 does not confer exclusive jurisdiction, see New Times, Inc. v. Arizona Bd. of Regents, 20 Ariz. App. 422, 513 P.2d 960 (1973), *vacated on other grounds*, 110 Ariz. 367, 519 P.2d 169 (1974); Brown v. Pitchess, 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975); Alberty v. Daniel, 25 Ill. App. 3d 291, 323 N.E.2d 110 (1974); Rzeznik v. Chief of Police of Southhampton, 374 Mass. 475, 373 N.E.2d 1128 (1978); Shapiro v. Columbia Union Nat'l Bank & Trust Co., 576 S.W.2d 310 (Mo. 1978), *cert. denied*, 444 U.S. 831 (1979). For cases concluding that federal jurisdiction conferred by 28 U.S.C. § 1331 or its forerunners is concurrent, see United States v. Sayward, 160 U.S. 493 (1895); League to Save Lake Tahoe v. B.J.K. Corp., 547 F.2d 1072 (9th Cir. 1976).

to section two of the Civil Rights Act of 1866, remains exclusively vested in the federal courts.[196]

Section three continued by stating that the district courts had:

> concurrently with the circuit courts of the United States, [jurisdiction over] . . . all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be, any of the rights secured to them by the first section of this act. . . .[197]

This grant of federal jurisdiction was a very controversial provision. Federal judicial power was previously limited to matters enumerated in article III of the United States Constitution[198] and in the Judiciary Act of 1789.[199] Many congressmen questioned whether Congress had authority to expand federal jurisdiction in this manner.[200] By this provision, section three guaranteed federal court access to persons who were unable in state courts to enforce contracts, inheritances, and land transactions[201] on the same basis as was afforded white persons.

---

[196]*See supra* note 183.

[197]Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866).

[198]U.S. CONST., art. III, §§ 1 and 2 provide:

> Section 1: The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> Section 2: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[199]An Act to Establish the Judicial Courts of the United States, ch. 20 (1789).

[200]*See* CONG. GLOBE, 39th Cong., 1st Sess. 479 (1866) (remarks of Sen. Saulsbury). He also challenged jurisdiction because it was exclusive of the state courts. *Id.* at 1680; *see also id.* at 1778 (remarks of Sen. Johnson).

[201]See *supra* text accompanying notes 172-77 for the matters specifically set forth in section 1 of the Act of 1866. Some of these matters were typically covered by state common law while other matters were subject to codification. There was very little debate over the precise operation of section 3 of the Act of 1866. One senator, however, questioned whether section 3 required that the person alleging discriminatory treatment first seek recourse in state court and actually suffer the deprivation of equality or whether disparate treatment at law was sufficient to allow access to federal courts without actual prior recourse to state courts. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1782 (1866) (remarks of Sen. Cowan). Senator Trumbull's comments on this aspect of section 3 indicated his understanding that prior resort to state courts was a prerequisite to the federal suit. *Id.* at 1759 (remarks of Sen. Trumbull). But he was quick to note that Congress also had the power to confer jurisdiction whenever there was a discriminatory state custom or law, without the middle step of state court refusal of remedy. *Id.*

For example, if one man contracted with another to buy some equipment, paid the money agreed upon but was subsequently refused delivery, ordinarily the buyer would have a contract action against the seller. If state law recognized an action in contract to enforce such an agreement among white persons, but denied the same cause of action to a black purchaser, section three of the Act of 1866 allowed this purchaser to bring his contract action in federal court. The disparate treatment of contract rights under state law would constitute a violation of section one of the Act of 1866.

However, if state law did not recognize such an action at all, neither for white nor black purchasers, no federal forum would be available because there would be no unequal treatment violative of section one.[202] Federal action pursuant to this part of section three was triggered if state law applied differently to white and black persons.

The next part of section three contained a further grant of federal jurisdiction:

> [A]nd if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act . . . or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper federal district or circuit court. . . .[203]

Thus, in addition to original jurisdiction, the federal courts had removal jurisdiction pursuant to section three. Removal was available to civil and criminal state court defendants in certain situations.

For example, in the civil context, if a seller failed to deliver goods to a purchaser who subsequently refused payment because of the nondelivery, the purchaser would ordinarily have a defense to an action by the seller for the contract price. If this defense could be pleaded and proved by a white defendant/purchaser but not by a black defendant/purchaser, the latter could remove the civil contract action to federal court because the unequal treatment under state law would violate section one of the Act of 1866. In the criminal context, if a black defendant was prohibited from testifying on his own behalf in a situation where a white defendant would have that right, the criminal action could be removed to federal court by the black defendant.

Removal was also available if a person was prosecuted in state court for enforcing the Act of 1866 or if a state official, on authority of the

---

[202] *See supra* text accompanying notes 168-70.

[203] Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866).

Act of 1866, refused to comply with discriminatory state laws and was subsequently prosecuted for violating state law.[204] Removal ensured that biased state court judges would not dispose of these cases in a manner inconsistent with the Act of 1866. Section three's removal provision has become 28 U.S.C. section 1443.[205] Section 1443(1) expands the availability of removal beyond the Act of 1866 to all cases alleging violations of federal statutes intended to secure equal rights.[206] "Equal rights," as used in section 1443 has, however, been construed narrowly to embrace only cases alleging disparate treatment based on racial discrimination.[207]

---

[204]*See* CONG. GLOBE, 39th Cong., 1st Sess. 1266-67, (1866) (remarks of Rep. Raymond); *id.* at 1271 (remarks of Rep. Kerr); *id.* at 598 (remarks of Sen. Davis).

[205]28 U.S.C. § 1443 (1982) provides:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

[206]*See* City of Greenwood v. Peacock, 384 U.S. 808 (1966) (tacking section 3 of the Civil Rights Act of 1866 to 28 U.S.C. § 1443); Georgia v. Rachel, 384 U.S. 780 (1966) (language of section 3 of Civil Rights Act of 1866 was not intended to limit scope of removal to rights recognized in statutes of the Reconstruction Era, but permitted removal in cases involving rights under both existing and future statutes providing for equal civil rights).

[207]This provision has been construed narrowly to apply only to those actions asserting denial of equal rights based on racial discrimination. *See* Georgia v. Rachel, 384 U.S. 780 (1966); *see also* Louisiana v. Rouselle, 418 F.2d 873 (5th Cir. 1969); Sweeney v. Abramovitz, 449 F. Supp. 213 (D. Conn. 1978) (both holding that section 1983 was only a law providing for equal rights when invoked for purposes of asserting racial equality). Section 1443 is distinguished from 28 U.S.C. § 1441(a) (1982), which allows removal by the defendant, as a matter of right, of any action commenced in state court that could have been brought originally in federal court. 28 U.S.C. § 1441(a) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Hence, actions brought in state court pursuant to 42 U.S.C. §§ 1981-1983 may be removed by defendants to federal court pursuant to section 1441 because they could have been brought in federal court in the first instance pursuant to 28 U.S.C. §§ 1331 or 1343. Removal pursuant to section 1443 allows removal of claims that could not have been brought originally in federal courts. The latter is premised on the interest in protecting certain defendants from illegal discrimination in administration of state justice. Because the perception is that the gross disparity in judicial process for whites and blacks has been remedied in the state systems since the 1860's, removal pursuant to section 1443 is rare. *See, e.g.*, Johnson v. Mississippi, 421 U.S. 213, 219 (1975); New York v. Jenkins, 422 F. Supp. 412, 415 (S.D.N.Y. 1976).

Removal pursuant to section 1443 is rare since it has been held that express discrimination at state law is a prerequisite to removal. A state defendant must establish express constitutional or statutory racial bias in the state court process, or the actual bias of the judge, for removal to be granted.[208]

Section three of the Civil Rights Act of 1866, therefore, created exclusive jurisdiction in the federal courts over direct violations of the Act and removal jurisdiction when equal justice was unobtainable from the state judicial system. The final part of section three prescribed the manner in which the federal courts were to exercise their jurisdiction:

> The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.[209]

Congress was acutely aware that the Civil Rights Act of 1866 was to have a major effect on the allocation of power, especially judicial power, between the state and federal government.[210] With the creation of federal jurisdiction by section three, the thirty-ninth Congress opened the doors of the federal courthouse to persons adjudicating claims that, but for discriminatory state laws or process would be exclusively within the province of the state judiciary.[211] It created, in effect, federal judicial supervision over state officials and state legal process. To mitigate the inroads on federalism made by these substantive and enforcement provisions of the Act of 1866, the latter part of section three, the predecessor to sec-

---

[208]*See* Johnson v. Mississippi, 421 U.S. 213 (1975); Texas v. Gulf Water Benefaction Co., 679 F.2d 85 (5th Cir. 1982); United States *ex rel.* Sullivan v. State, 588 F.2d 579 (8th Cir. 1978); Northside Realty Assocs., Inc. v. Chapman, 411 F. Supp. 1195 (N.D. Ga. 1976); Frinks v. North Carolina, 333 F. Supp. 169 (E.D.N.C. 1971), *aff'd*, 468 F.2d 639 (4th Cir.), *cert. denied*, 411 U.S. 920 (1972).

[209]Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866).

[210]*See supra* text accompanying notes 169-70 and 179-84.

[211]Matters relevant to contracts, possession of real estate, inheritance, and criminal justice are matters typically within state control.

tion 1988, provided that federal courts could consider state law in their adjudication of these claims.

By its terms, section three of the Act of 1866 required federal courts to exercise their jurisdiction "in conformity with the laws of the United States." However, if such laws were not "suitable" or not "adapted to the object" or if they were "deficient," then the court was to apply the "common law" as modified by the constitution or statutes of the state in which the court was located. Professor Kreimer has argued that the statute's use of the terms "common law" is ambiguous because of the decision of the Supreme Court in *Swift v. Tyson* and its statements regarding the nature of the common law.[212]

Decided in 1842, *Swift* construed the Rules of Decision Act which provided: "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."[213] The issue presented was whether the term "laws" as used in the statute included the decisions of state tribunals. The court held that it did not.

Justice Story explained that the "laws" of the states usually referred to rules and enactments promulgated by legislative authority or to long established local customs having the force of laws. The Court decided that judicial opinions were "at most, only evidence of what the laws are, and are not of themselves laws."[214]

The common law was not the law of a single country or state but of the world. Judges were to ascertain "upon general reasoning and legal analogies" the *true* rule of law which governed the case.[215] Although federal courts were to give "deliberate attention and respect" to the decisions of state tribunals, state decisional law could not "furnish positive rules, or conclusive authority" by which the judgments of federal courts were to be "bound up and governed."[216]

Kreimer argued that the view of the common law expressed in *Swift* should be read into section three of the Act of 1866. He urged that section 1988's predecessor which directed that such courts apply the common law, be read as authorizing federal courts to engage in the creation of federal common law.

An important distinction between section three of the Act of 1866 and the Rules of Decision Act is that the former expressly directed courts to apply the "common law" whereas the latter directed the courts to apply

---

[212]Kreimer, *supra* note 16, at 618-21.

[213]*Swift*, 16 Pet. at 18.

[214]*Id.*

[215]*Id.* at 19.

[216]*Id.*

"the laws" of the several states. Section three does not say that the courts were to create common law. The ambiguity in the Rules of Decision Act was whether "laws" included court decisions. It cannot seriously be contested that the term "common law" is imbued with such vagueness.

Erie Railroad Co. v. Tompkins[217] exploded the myth that a universal body of general common law existed and overruled *Swift's* authorization of federal judicial creation of general common law. There were several grounds for reversal. First, the Court in *Erie* reviewed *Swift's* discussion of the Judiciary Act of 1789 and concluded that the construction given it was erroneous.[218] Second, the Court held that *Swift's* construction of the Rules of Decision Act had developed a new "well of uncertainties" and that there was no "satisfactory line of demarcation between the province of general law and that of local law."[219] Third, and most importantly, the Court held:

> And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such power upon the federal courts.[220]

Erie did not merely reconsider the view of the common law espoused in *Swift*, it rejected the original validity of *Swift's* observations.[221] *Erie* and the authority cited therein reflect the fact that among judges and academics in the late 1800's and early 1900's no consensus existed with respect to a theory of general common law. The historical sources recited in the immunity cases and the variation among states in the rule of law applied also support the view that state common law judges did not subscribe to a theory of general common law.[222]

It is hard to believe that the congressmen of the Reconstruction Era subscribed to the view that their state court judges did not make law for their respective states. The debates are full of diatribes concerning the perceived impact of the Act of 1866 upon state judges and upon the functioning of state courts.[223] Conversely, there is little, if anything, in the

---

[217] 304 U.S. 64 (1938).
[218] *Id.* at 71-74.
[219] *Id.* at 74-75.
[220] *Id.* at 78.
[221] *Id.* at 72-73.
[222] *See supra* text accompanying notes 98-147.
[223] *See supra* note 179.

debates to suggest that these same congressmen were versed in the jurisprudential vagaries of the *Swift v. Tyson* theory of common law.

It is the view of this author that the most plausible reading, and the reading most consistent with the context of the Act and its history, is that section three of the Act of 1866 required federal courts to apply the common law of the state in which they were located. This directive was not unrestricted; state law applied only if it was consistent with the purposes of the Civil Rights Act.

Section one of the Act concerned state laws pertaining to contracts, property, inheritances, etc. These subjects were then and are now largely within the province of common law. One of the possible scenarios for federal court involvement under the Act of 1866 was that a state contract action could be removed to federal court because a black party defendant was denied fair process in state court. The underlying contract action would then proceed in the federal forum. It makes sense that section three of the Act, directing federal courts to apply common law, referred to the common law of the state where the action arose rather than the common law of all states, or federal common law. This construction of section three of the Act of 1866 is necessary to give effect to the obvious spirit of the statute.

Allowing state law to apply where it did not breach the equality rights prescribed by section one created an incentive for the states to eliminate disparate treatment. If discrimination in connection with the substantive issues enumerated in section one were eliminated and if the access to justice concerns of section two could be assuaged, the states could assure that disputes among their citizens would be determined by state tribunals applying state law.

Section three was a compromise. Federal courts were to be resorted to when state law and state courts were inadequate to protect the equal rights of the freed slaves. In the event of federal involvement in civil or criminal disputes arising under state law, federal courts were allowed to utilize state law to the extent it did not abrogate the laws of the United States.[224]

The Act of 1866 established a national minimum of liberty; if state law addressed an issue, it had to do so in a manner which treated freed slaves equally. States were free to go further in the creation and protection of civil rights, but if the minimum of equality prescribed by the Act of 1866 was not achieved, state law and state courts would be bypassed. Where federal jurisdiction was invoked pursuant to the Act, the balance continued to be struck. If federal law was not available, non-discriminatory state law would control and preempt the federal court from exercising common law powers. On one level, national uniformity would be sacrificed in this manner; on another level, however, a national minimum of protection was established and guaranteed by the Civil Rights Act of 1866.

---

[224] *See supra* notes 151-52 and accompanying text.

Clearly Congress endeavored to cause a reformation of state judicial process and law, vis-a-vis racial distinctions in criminal, property, inheritance, and contract law.[225] The federalism concerns of the opposition did not go unheeded. Resolution of these competing values was accomplished in section three of the Act of 1866 with its conditions precedent to federal jurisdiction and its prescription for the interplay of state and national law in federal adjudication of claims under the Act.

3. Defining the issues.—Issues raised by the passage and content of the Civil Rights Act of 1866 foreshadowed all subsequent debate regarding the scope of federal civil rights legislation. The issue of federalism and the need to balance national protection of civil rights against preservation of state autonomy was one of the most fundamental concerns debated. The power of Congress to interpose the United States government into the relations between a state and its citizens through the federal judiciary implicated federalism values. The Act of 1866 shared a common conception with all other Reconstruction Era legislation; it was spawned in a whirlwind of conflict over the most basic notions of federal and state power. It became law at a period in United States history where there existed, at all levels of government, vehement disagreement over passionately held attitudes concerning racial equality and individual liberties. At no time since has the legislative branch seemed so sharply or expressly divided on the issue of civil rights.

Few cases have arisen under the Act of 1866, *per se*. Subsequent recodification separated the provisions of the Act so that it now survives as separate parts of United States civil rights legislation.[226] Despite its relative obscurity in the civil rights enforcement scheme today, the Act of 1866 was the predecessor to the most significant components in the civil rights vindication scheme: the fourteenth amendment and section 1983.[227] Enforcement provisions from the Act of 1866, modeled on the Fugitive Slave Act of 1850, were expressly adopted by the forty-second Congress in the passage of the Ku Klux Klan Act.

C. The Ku Klux Klan Act of 1871

Section one of the Ku Klux Klan Act of 1871[228] created a civil remedy for persons deprived of constitutional rights by persons acting under color

---

[225] *See* CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (remarks of Sen. Trumbull) ("The bill draws to the federal government no power whatsoever if the states will perform their constitutional obligations"). Representative Wilson stated, "[I]f the states would all observe the rights of our citizens there would be no need of the bill." *Id.* at 1117 (remarks of Rep. Wilson).

[226] *See supra* text accompanying notes 171-224.

[227] While sections 1981 and 1982 are used somewhat regularly, the lion's share of civil rights cases arises under section 1983 and the fourteenth amendment.

[228] An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other purposes. ch. 22, 17 Stat. 13 (1871).

of state law. It was expressly linked to the Civil Rights Act of 1866. The predecessor to section 1983 provided:

> That any person who, under color of state law, statute, ordinance or regulation, custom or usage of any state, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; *such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the Act of the ninth of April, eighteen hundred and sixty-six, entitled "An Act to protect all persons in the United States in their civil rights and to further the means of their vindication;"* and other remedial laws of the United States which are in their nature applicable in such cases.[229]

The Ku Klux Klan Act, section one, first provided that a private civil action could be brought against any person whose conduct, under color of state law, violated the Constitution of the United States. This portion of section one is currently codified at 42 U.S.C. section 1983.[230] As originally enacted it applied only to conduct under color of state law which caused the plaintiff to suffer a constitutional deprivation.[231] Subsequently, section 1983's language was changed, and conduct resulting in the deprivation of rights secured by either the Constitution *or laws* of the United States is now actionable pursuant to section 1983.[232]

Like section one of the Act of 1866, the Ku Klux Klan Act expressly declared that state law, custom or practice which was contrary to the civil rights act was to be ignored.[233] The Act of 1871 accomplishes this in substantially the same language as the Act of 1866. The forty-second Congress created a civil remedy by borrowing the language employed by the thirty-ninth Congress in the latter's enactment of section two of the Act of 1866.[234] The remedy provided for in the Act of 1866, however, was

---

[229]*Id.* at § 1 (emphasis added).

[230]See *supra* text accompanying note 5 for the text of 42 U.S.C. § 1983.

[231]Primarily a deprivation under the thirteenth, fourteenth, and fifteenth amendments to the Constitution.

[232]See Maine v. Thiboutot, 448 U.S. 1 (1980), for a discussion of the "and laws" addition to the text of § 1983.

[233]See *supra* text accompanying note 172 for text of section 1 of the Civil Rights Act of 1866.

[234]See *supra* text accompanying note 178 for text of section 2 of the Civil Rights Act of 1866.

only criminal in nature and was available only to redress violations of the 1866 Act's section one right to equal treatment.

In the interim between 1866 and 1871, the fourteenth amendment was ratified.[235] The Act of 1871 was broader than its predecessor; like the Act of 1866, it conferred a remedy for violation of equal protection at state law, but further provided a remedy for violation of the right to due process conferred by the fourteenth amendment. Unlike its predecessor, the Act of 1871 did not contend with fierce opposition based on the constitutional authority for the exercise of congressional power.[236] Acting pursuant to section five of the recently ratified fourteenth amendment, Congress clearly had constitutional authority to enact section one of the Ku Klux Klan Act.[237] The Act of 1871 did, however, meet opposition based on arguments similar to those which had been raised in the debates over the Civil Rights Act of 1866.[238]

---

[235]U.S. CONST., amend. XIV §§ 1 and 5 provide:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The equal protection clause of the fourteenth amendment is not restricted to equal treatment among races as was section one of the Act of 1866. Hence violations of equal protection based on classifications unrelated to race are actionable through section 1983. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (gender-based classifications violate the fourteenth amendment unless shown to serve an important governmental purpose and to be related substantially to achievement of those objectives); Graham v. Richardson, 403 U.S. 365 (1971) (welfare benefits and aliens). Actions pursuant to section 1 of the Act of 1866's successors, 42 U.S.C. §§ 1981 and 1982, must be premised on racial classifications. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (white person may maintain an action under § 1981 based on racial discrimination); Runyon v. McCrary, 427 U.S. 160 (1976) (crucial factor in a § 1981 case is racial discrimination); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (section 1982 bars discrimination in housing only in forms of racial discrimination); Olivares v. Martin, 555 F.2d 1192 (5th Cir. 1977) (race must be a factor in discrimination actionable under § 1981). To the extent, however, that sections 1981 and 1982 reach private conduct as well as conduct under color of state law, they provide a broader remedy than section 1983. *See Runyon*, 427 U.S. at 170; Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 435 (1973); *Jones*, 392 U.S. at 425-26.

[236]See *supra* text accompanying notes 164-70 for questioning of constitutional authority surrounding the passage of the Civil Rights Act of 1866.

[237]*See* Quern v. Jordan, 440 U.S. 332, 351 n.3 (1979) (Brennan, J., concurring); Mitchum v. Foster, 407 U.S. 225, 239-40 (1972); Gressman, *supra* note 13, at 1328-29, 1333.

[238]*See supra* note 170.

Section one of the Ku Klux Klan Act granted original jurisdiction to the federal courts. Jurisdiction thereby conferred was expressly subject to the provisions of the Civil Rights Act of 1866.[239] Today this grant of jurisdiction is codified at 28 U.S.C. section 1343.[240] Section 1343 does not contain the original reference to the Act of 1866, but such reference is now unnecessary due to the way in which the 1866 Act has been recodified in title 42. Section three of the Act of 1866—directly related to the exercise of federal judicial power in civil rights cases—has been recodified at 42 U.S.C. section 1988 and is expressly applicable to all civil rights statutes.[241] By its terms, section 1988 applies to "jurisdiction in civil and criminal matters conferred on the district courts by provisions of . . . the Title 'CIVIL RIGHTS,' and of the Title 'CRIMES,' for the protection of all persons in the United States in their civil rights and for their vindication."[242] Section 1983 is, therefore, subject to the requirements of section 1988.

The next section of this article will discuss the use that the Supreme Court has made of section 1988. Section 1988 has been applied in only a few situations and the doctrine which has been generated is largely consistent with the use of that statute proposed in this article.

V. Section 1988—Precedent

The Supreme Court has applied section 1988 as a source of law in civil rights actions arising under 42 U.S.C. sections 1981,[243] 1982,[244] and 1983.[245] However, the cases in which the Court has referred to section 1988 have typically involved rather narrow questions, such as the applicable statute of limitations, measure of damages, suspension and tolling of the statute of limitations, and survivorship of the cause of action.[246] Section 1988 has been "triggered" upon the conclusion that a particular civil rights provision did not address the issue at hand. The Court has not, however, consistently applied section 1988 nor has it clearly established guidelines

---

[239]*See supra* text accompanying note 229.

[240]See *supra* note 82 for text of 28 U.S.C. § 1343.

[241]See *supra* note 152 for the text of § 1988. Professor Eisenberg viewed section 1988 as applicable to federal civil rights actions only in cases removed from state court to federal court. *See* Eisenberg, *supra* note 17, at 533-35. The language of section 1988 is not so limited. Also, it is the position of this author that section 1988 represents a compromise in the struggle between state and federal power. *See infra* text accompanying notes 209-14. Thus, consideration of state law enhances and preserves the restructured federalism of the post-Civil War era.

[242]42 U.S.C. § 1988 (1982).

[243]*See supra* note 176.

[244]*See supra* note 177.

[245]*See supra* text accompanying note 5.

[246]*See infra* text accompanying notes 247-309.

for determining when the civil rights provisions are deficient. Cases which have utilized section 1988 illustrate this point.

This discussion of section 1988 precedent is intended to demonstrate that the Court has not entirely ignored section 1988 in its decisions under the Civil Rights Acts, notably section 1983. When it has utilized the statute, its application has typically been consistent with the method of application proposed in this article.

A. Statute of Limitations Cases

In *Board of Regents v. Tomanio*,[247] Justice Rehnquist's majority opinion on behalf of six Justices concluded that pursuant to section 1988, federal courts were bound to apply state statutes of limitations when federal law provided no rule of decision for actions under section 1983.[248] Relying on *Johnson v. Railway Express*[249] and *Robertson v. Wegmann*,[250] the Court held, "In 42 U.S.C. Sec. 1988 . . . Congress quite clearly instructs [federal courts] to refer to state statutes when federal law provides no rule of decision for actions brought under section 1983."[251] The Court also concluded that state tolling provisions were applicable.[252]

Only if state law was not consistent with federal law would the majority hold state law inapplicable.[253] Justice Rehnquist concluded that the New York rule against tolling was not inconsistent with the purposes of section 1983[254] because section 1983 claims were *per se* separate and independent of state law claims.[255] The majority opinion rejected balancing

---

[247]446 U.S. 478 (1980).

[248]*Id.* at 483-86.

[249]421 U.S. 454 (1975). In *Johnson*, the Supreme Court concluded that filing a Title VII claim with the Equal Employment Opportunity Commission did not toll the running of the statute of limitations relevant to petitioners section 1981 claim. The Court summarily concluded that Tennessee law supplied the statute of limitations for section 1981. The issue then became whether this statute was tolled because Tennessee law provided no extension of time in similar circumstances. The Court concluded that the statute was not tolled and that petitioner's section 1981 claim was time barred. The Court cited section 1988 to support its contention that state law fully determined the matter. No consideration was given to whether state law was compatible with the policies of section 1981.

[250]436 U.S. 584 (1978).

[251]*Tomanio*, 446 U.S. at 484 (quoting Robertson v. Wegmann, 436 U.S. 584 (1978)).

[252]*Id.* at 485-86.

[253]*Id.* at 486.

[254]*Id.* at 491.

[255]Petitioner had first brought an action in state court based on state law challenging the respondent's refusal to grant petitioner a license to practice chiropratic medicine. When the state suit was concluded against petitioner, she brought a section 1983 claim in federal court. She argued therein that the pendency of her state proceedings tolled the running of any applicable statute of limitations. The separate and independent status of section 1983 claims has been substantially eroded in recent preclusion decisions of the Burger Court. Although the Court avoided the *res judicata* issue in *Tomanio*, it has since held that section

the purposes of section 1983 against the purposes of repose embodied in statutes of limitations, refusing to find that a section 1983 plaintiff could reject a state statute as inconsistent with section 1983 merely because a federal, common law rule would be more permissive. Justice Rehnquist stated, "If success of the section 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant."[256]

Justice Brennan, joined by Justice Marshall, dissented. He concluded that the New York provision was inconsistent with section 1983's purpose to provide a federal forum to section 1983 litigants.[257] The majority had not focused on this purpose of section 1983 in its determination that the New York statute was consistent with the federal civil rights provision.

In *Chardon v. Juan Fumero Soto*,[258] the Court held, pursuant to Puerto Rican law, that a plaintiff's section 1983 claim did not lapse during the pendency of an attempted federal class action. Puerto Rican law stated that the statute of limitations began to run anew following denial of class certification. Justice Stevens wrote for a majority of six and concluded that, in accord with *Tomanio*, section 1988 required the application of local law concerning the tolling of the statute of limitations.

Justice Rehnquist dissented. On behalf of three Justices, he argued that section 1988 first required recourse to applicable federal law that was "adapted to the object."[259] Tolling of the statute of limitations pending class certification under rule 23 of the Federal Rules of Civil Procedure had been discussed in a federal antitrust case.[260] The dissent argued that in *American Pipe v. Utah*,[261] the Court fashioned a tolling doctrine from

---

1983 claims similar procedurally to the one at issue in *Tomanio* are barred by claim preclusion from being brought in federal court proceedings subsequent to a state court action. *See* Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980); *see also* Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. Rev. 59 (1984).

[256] *Tomanio*, 446 U.S. at 488 (quoting Robertson v. Wegmann, 436 U.S. 584 (1978)).

[257] *Id.* at 497 (Brennan, J., dissenting). The primacy of section 1983's purpose to provide a federal forum would, for the dissent, likewise justify the rejection of New York rules of *res judicata* which would bar a subsequent section 1983 action in federal court. This argument was rejected in *Migra*, 465 U.S. 75. The Supreme Court held recently that the purposes underlying a federal statute may very well result in the federal court refusing to give the same preclusion effect to a state court judgment as would the rendering state where the state preclusion rules would deny the litigation of the claim. *See* Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985). The Court therein rejected the possibility of a federal court ever according greater preclusive effect to a state court judgment than would the rendering state. *Id.* at 1333 n.3-1334.

[258] 462 U.S. 650 (1982).

[259] *Id.* at 663 (Rehnquist, J., dissenting).

[260] *Id.* at 663-64 (Rehnquist, J., dissenting).

[261] 414 U.S. 538 (1974).

rule 23 which prescribed that statutes of limitation were to be suspended during the pendency of class certification; when certification was denied the statute of limitations resumed running where it left off.[262]

Justice Rehnquist understood section 1988 first to require recourse to federal law which, apparently, included federal decisional law.[263] The majority agreed that section 1988 first required recourse to federal law.[264] Although Justice Stevens did not argue the applicability of decisional law, he construed the federal case law narrowly, and concluded that it did not supply a rule of law for section 1983.[265] Finding no applicable federal law, Justice Stevens considered state law pursuant to section 1988 and *Tomanio*.[266] Neither the majority nor the dissent discussed whether non-civil rights federal case law could supply applicable federal law pursuant to section 1988's initial inquiry. The majority, however, demonstrated a disinclination to apply decisional law that did not expressly relate to civil rights. The dissent would have been more liberal and would have applied roughly analogous decisional law.

Two recent decisions shed further light on section 1988. In *Burnett v. Grattan*,[267] the Court affirmed its general approach to statute of limitations problems in section 1983 cases.[268] The Court also discussed, for the first time, section 1988's proscription against application of state law found to be inconsistent with the purposes and policies of section 1988.

Emphasizing the uniqueness of section 1983 actions, the majority stated, through Justice Marshall, "A state law is not 'appropriate' if it fails to take into account particularities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Act."[269] Because section 1983 provided an independent remedy, a Maryland statute of limitations requiring prior administrative proceedings was held to be in-

---

[262]*Chardon*, 462 U.S. at 665 (Rehnquist, J., dissenting).

[263]*Id.* at 663 (Rehnquist, J., dissenting).

[264]*Id.* at 657.

[265]*Id.* The distinction was critical. If the law of the federal decision applied, then the section 1983 plaintiffs were time-barred from bringing suit. Pursuant to Puerto Rico's rule that the statute began to run anew, the respondents were not time-barred.

[266]*Id.* at 656-57.

[267]104 S. Ct. 2924 (1984).

[268]*Id.* at 2929-30. The Court affirmed its general approach to statute of limitations problems in section 1983 cases. However, the majority held that the district court had improperly borrowed a state statute of limitations which required recourse to administrative proceedings. The Court characterized section 1988 as mandating a three-step approach: first, consideration of whether United States law was responsive to the issue; second, whether state statutory and common law was applicable if there was no appropriate federal law; and third, utilization of a state law unless it was inconsistent with the Constitution and laws of the United States. *Id.* at 2928-29.

[269]*Id.* at 2930.

consistent with section 1983 and, therefore, inapplicable pursuant to section 1988.[270]

In *Wilson v. Garcia*,[271] the Supreme Court affirmed that state statutes of limitations govern section 1983 cases pursuant to section 1988. It found, however, as a matter of federal law, that section 1983 was to be uniformly characterized as a personal injury remedy.[272] The Court criticized the myriad characterizations of section 1983 actions which had evolved in different opinions attempting to determine, in various circumstances, which state statute of limitations was most closely analogous. The Court noted that in any given litigation a section 1983 cause of action is potentially subject to three or more different limitations periods depending on how the conduct alleged or the cause of action was characterized.[273] Relying on the history of section 1983,[274] the Court declared, as a matter of statutory interpretation, that section 1983 was primarily intended to redress personal injury. Although this construction of section 1983 was hardly dictated by the statute's history,[275] *Garcia* does not undermine *Tomanio's* conclusion that state statutes of limitations apply. The result of *Garcia* is merely that a state's statute of limitations for personal injury actions will be the relevant statute.[276]

The Supreme Court has definitively concluded that section 1983 is subject to section 1988 and that section 1983 is deficient in not providing for a statute of limitations. Following *Garcia*, all section 1983 suits should be subject to the state's personal injury statute of limitations. However, recent case law reveals that *Garcia* may not be able to meet the task of establishing reasonable certainty in the determination of applicable statutes of limitations. Unless the state statute of limitation is inconsistent with the purposes of section 1983, it must be applied.[277]

---

[270]*Id.* at 2931. Justice Rehnquist concurred, but he based his opinion on the belief that the Maryland legislature had not intended that the contested statute of limitations be applicable to section 1983 actions. *Id.* at 2936 (Rehnquist, J., concurring). He would measure the consistency of the state statute of limitations with section 1983 by looking at the intent of the state legislature. Where the legislature intended the statute to apply to civil rights cases, it would be presumptively valid. *Id.* at 2935 (Rehnquist, J., concurring). Further, Justice Rehnquist stated that it was improper for the Court to value the policies of section 1983 higher than the values of repose underlying statutes of limitations. *Id.* (Rehnquist, J., concurring).

[271]105 S. Ct. 1938 (1985).

[272]*Id.* at 1948.

[273]*Id.* at 1948-49.

[274]*Id.* at 1947-48.

[275]*Id.* at 1948. In this regard the decision was similar to the immunity cases. *See supra* text accompanying notes 98-148.

[276]*Id.* at 1949.

[277]Courts have infrequently concluded that the most analogous state statute of limitations was inconsistent with the purposes of section 1983. *See, e.g.*, Childers v. Independent School

B. Computation of Damages Cases

In *Jones v. Mayer*,[278] the Supreme Court implied a private cause of action from 42 U.S.C. section 1982 to redress private racial discrimination in housing.[279] A question left open in *Mayer* was what damages, if any, were appropriate to redress violations of section 1982.[280] The Court answered this in *Sullivan v. Little Hunting Park*,[281] where a majority of the Justices turned to section 1988 for an answer. Maintaining that section 1343 created federal jurisdiction over the section 1982 cause of action,[282] the Court held that "the existence of a statutory right implies the existence of all necessary and appropriate remedies."[283] Then, without elaboration and relying on only one federal court of appeals case, the Court stated, "Compensatory damages for deprivations of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. section 1988."[284] Although the Court did not explore the issue of damages further, Justice Douglas' majority opinion maintained that, pursuant to section 1988, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."[285]

Dist. No. 1 of Bryan County, 676 F.2d 1338 (10th Cir. 1982) (six-month statute of limitations for administrative filing of claims pursuant to state tort claims act was inconsistent with § 1983). *But see* Osgood v. District of Columbia, 567 F. Supp. 1026 (D.D.C. 1983); Stewart v. City of Northport, 425 So. 2d 1119 (Ala. 1983) (both holding a six-month statute of limitations barred a § 1983 claim).

[278]392 U.S. 409 (1968).

[279]The majority, in an opinion by Justice Stewart, concluded on the basis of section 1982's "plain and unambiguous terms" that private discrimination was reached by former section 1 of the Civil Rights Act of 1866. *Id.* at 420. Legislative history was cited by the majority to support this construction of section 1982. *Id.* at 422-37. Further, the Court concluded that Congress did indeed have power pursuant to the thirteenth amendment to enact such legislation. *Id.* at 444. Because the Supreme Court reversed a lower court order of dismissal, it did not have to address the question of what damages would be available under this section 1982 action. The construction of section 1982 espoused in *Jones* does not accord with the legislative history of section 1 of the Civil Rights Act of 1866. *See supra* text accompanying notes 171-224. The express language of section 1982 also does not create a private cause of action. In the context of the Civil Rights Act of 1866, section 1982's predecessor was enforceable only through the criminal remedy and only against public persons versus private actors. "[T]he language, structure, and legislative history of the 1866 Civil Rights Act shows, I believe, that the Court's thesis that the Act was meant to extend to purely private action is open to the most serious doubt, if indeed it does not render that thesis wholly untenable." *Jones*, 392 U.S. at 473 (Harlan, J., dissenting). *But see* Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. CAL. L. REV. 274 (1967).

[280]*Jones*, 392 U.S. at 414-15.

[281]396 U.S. 229 (1969).

[282]*Id.* at 238.

[283]*Id.* at 239.

[284]*Id.*

[285]*Id.* at 240.

In *Carey v. Piphus*,[286] Justice Powell, for a majority of seven, concluded that section 1983 damages should be compensatory in nature. The majority stated that without a compensatory theory of section 1983 relief, the purposes of section 1983 would be defeated.[287] The "initial inquiry" in computing such damages was the common law of torts, and where such common law was inappropriate, the Court held it must adapt the common law rule[288] by tailoring it to suit the purposes of section 1983.[289] Section 1988 was viewed by the Court as authorizing federal courts to consider state common law.[290]

Together, *Carey* and *Sullivan* express the rule that compensatory damages are available under section 1983 and that they are to be computed pursuant to federal or state law, including state common law, whichever better serves the purposes of section 1983.[291] Further, if state common law does not provide suitable relief, then the federal courts are to fashion a suitable federal common law rule of damages. The authority for these rules of section 1983 jurisprudence is section 1988.[292]

The *Sullivan* approach to the computation of damages in section 1983 cases is result oriented. The theory appears to be that for the plaintiff,

---

[286] 435 U.S. 247 (1978).

[287] *Id.* at 258. This conclusion was premised on the belief that Congress must have known about the compensatory nature of damages when it enacted section 1983, *id.* at 255; as well as on the Court's belief that such damages would further the purpose of section 1983 to deter violations of civil rights. *Id.* at 256.

[288] *Id.* at 258.

[289] *Id.* at 258-59. This process of considering and then rejecting the common law because such would not fulfill the purposes of section 1983 is the same methodology employed, tacitly, in the immunity cases. *See supra* text accompanying notes 98-148; *see also* Smith v. Wade, 461 U.S. 30, 34 (1983):

> We noted in *Carey* that there was little in the section's legislative history concerning the damages recoverable for this tort liability. . . . In the absence of more specific guidance, we looked first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute. . . . We have done the same in other contexts arising under § 1983, especially the recurring problem of common-law immunities.

[290] *Carey*, 435 U.S. at 258 n.13.

[291] Although *Sullivan* arose in the context of section 1982, the Court's holding that compensatory damages were to be computed through section 1988's application of state or federal law, whichever better fulfills the purposes of the civil rights legislation, has been relied upon in the context of section 1983. *See* Bell v. City of Milwaukee, 746 F.2d 1205, 1234 (7th Cir. 1984); McFadden v. Sanchez, 710 F.2d 907, 913 (2nd Cir.), *cert. denied*, 464 U.S. 961 (1983); Dobson v. Camden, 705 F.2d 759, 764 (5th Cir. 1983); Garrick v. City and County of Denver, 652 F.2d 969, 971 (10th Cir. 1981); Williams v. United States, 353 F. Supp. 1226, 1232 (E.D. La. 1973).

[292] *See* Monell v. Department of Social Services, 436 U.S. 658, 701 n.66 (1978); Adickes v. S.H. Kress & Co., 398 U.S. 144, 231 (1978) (Brennan, J., concurring in part and dissenting in part); Monroe v. Pape, 365 U.S. 167, 251-52 n.79 (1961) (Frankfurter, J., dissenting).

"more is better," and since section 1983 is a plaintiff's remedial provision, its purposes are better served by awarding the greatest possible measure of damages. Clearly, this use of section 1988 is inconsistent with its use in the statute of limitations cases. As has been demonstrated in those decisions, the outcome of the application of differing statutes of limitations was not a legitimate basis for courts to choose between state and federal law.

As a matter of construction and application of section 1988, the damages cases are an aberration. The systemic development of section 1988 doctrine in the statute of limitations cases is a more legitimate guide to a correct use of section 1988. The cases determining whether section 1983 suits survive the death of the plaintiff are consistent with the statute of limitations cases.

C. Survival of Section 1983 Actions

The Supreme Court, in *Robertson v. Wegmann*,[293] concluded that section 1983 and other federal law were deficient in providing for whether section 1983 claims survived the death of the injured party, thus triggering an inquiry into state law pursuant to section 1988.[294] The lower court had rejected a Louisiana survivorship statute and had instead created a common law rule that section 1983 claims survived in favor of a decedent's personal representative.[295]

The Supreme Court reversed. Instead of fashioning a federal common law rule, the Court considered the applicability of Louisiana law. It held that Louisiana law was to be applied unless it was inconsistent with section 1983:

> Despite the broad sweep of section 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship. The policies underlying section 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law. . . . No claim is made here that Louisiana's survivorship laws are in general inconsistent with these policies, and indeed most Louisiana actions survive the plaintiff's death.[296]

---

[293] 436 U.S. 584 (1978).

[294] *Id.* at 588.

[295] *Id.*

[296] *Id.* at 590-91. Louisiana had codified its survival law, which granted survival in favor of a spouse, children, parents or siblings. This was a statutory modification of the common law rule of no survivorship. Thus, this case fell squarely within the language of section 1988. Since the decedent had no relatives with the statutory relationship, the section 1983 claim

The majority noted in *Robertson* that the use of the term "common law" was ambiguous in section 1988: "[The] reference to 'the common law' might be interpreted as a reference to the decisional law of the forum State, or as a reference to the kind of general common law that was part of our federal jurisprudence by the time of section 1988's passage in 1866."[297] The Court referred to *Swift v. Tyson*[298] for the understanding of common law in 1866. Because the Louisiana law at issue was statutory in nature, however, the Court in *Robertson* did not have to determine whether section 1988 extended to state common law.

The Court's consideration of Louisiana law, and whether it was consistent with section 1983, turned on the general application of the state law and not on the outcome of a specific case in which it might be applied.[299] Rejecting an argument that national uniformity was required, the Court stated:

> [W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which section 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues.[300]

National uniformity was trumped by the command of section 1988.[301]

---

would have abated if state law controlled. Section 1988 provides in relevant part that "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held" governs where it is not inconsistent with section 1983. *See also* Theis, Shaw v. Garrison: *Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681 (1976).

[297] *Id.* at 589-90 n.5.

[298] 41 U.S. (16 Pet.) 1 (1842). *See supra* note 60.

[299] "A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson*, 486 U.S. at 593. As in *Tomanio*, the Court rejected a *Sullivan*-like construction of section 1988 which would have allowed a plaintiff to choose the more favorable of state or federal law. "If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." *Id.*

[300] *Id.* at 593-94 n.11.

[301] Justice Blackmun dissented with Justices Brennan and White. The dissent took exception to the majority's starting point — that section 1983 and federal law were deficient. *Id.* at 595 (Blackmun, J., dissenting). Rather than conclude that federal law was not "adapted to the object," the dissent would have found a federal rule through the interplay of section 1983 and federal doctrine. Justice Blackmun noted that in *Sullivan*, the section 1983 plaintiff had a choice between state and federal law, depending on which better served the plaintiff's needs. *Id.* at 596-97 (Blackmun, J., dissenting). Although there was no civil rights case on point, the dissent would have found that section 1983 was not deficient due to the ability to derive a rule from its policies, i.e. the creation of federal common law. Justice Blackmun also

After *Robertson*, the Court decided *Carlson v. Green*.[302] *Carlson* was a *Bivens* action[303] in which the question of survivorship of a fourth amendment claim against a federal official arose. Justice Brennan's majority opinion concluded that uniformity was an overriding concern in that case.[304] Further, he concluded that section 1988 did not apply and that there was no interest in applying state law in a federal action against federal officials.[305] The majority fashioned a uniform rule that *Bivens* actions absolutely survived.

Both Justice Powell concurring and Justice Rehnquist dissenting would have applied section 1988 and its directive to apply state law.[306] Justice Powell thought it unseemly that federal and state officials were covered by different rules of liability.[307] Justice Rehnquist rejected uniformity as being a compelling reason for not following *Robertson*. He viewed section 1988 as accommodating federalism values by allowing federal courts to defer to state rules.[308]

This precedent established that section 1988 directs courts to apply state survivorship laws to section 1983 actions against persons acting under color of state law.[309] Only when such state law is inconsistent with section 1983 may it be rejected.

D. Summary: Section 1988 Precedent

The Supreme Court has recognized section 1988 provides a guide to sources of law in section 1983 cases and in suits involving other civil rights statutes. Section 1988 is triggered by a determination that section 1983 is deficient—that section 1983 does not sufficiently prescribe the rule of

---

advocated a lesser standard establishing inconsistency with section 1983 and allowing more frequent rejection of state law in cases where section 1988 applied. *Id.* at 596 (Blackmun, J., dissenting). Further he would have limited operation of section 1988 to matters of procedure and remedy only. *Id.* (Blackmun, J., dissenting).

[302]446 U.S. 14 (1980).

[303]A *Bivens* action refers to claims asserted against federal officials by implying a cause of action from the Constitution itself. Because section 1983 reaches only action under color of *state* law, claims against federal officials cannot be asserted under section 1983. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[304]*Carlson*, 446 U.S. at 24.

[305]*Id.* at 24 n.11.

[306]*Id.* at 29 (Powell, J., concurring); *id.* at 48 (Rehnquist, J., dissenting).

[307]*Id.* at 30 (Powell, J., concurring).

[308]*Id.* at 48, 50 n.16 (Rehnquist, J., dissenting).

[309]The Court has left open the possibility that a state law that does not allow survival or that abates actions wherein the decedent died as a result of the alleged civil rights deprivation may be inconsistent with section 1983. *See Robertson*, 436 U.S. at 594. *But see* Black v. Cook, 444 F. Supp. 61 (W.D. Okla. 1977) (a § 1983 suit based on plaintiffs' minor son's death from injuries sustained in a beating while incarcerated in county jail which was dismissed pursuant to state law governing abatement of actions).

law for the case at bar.[310] The courts are not free, in the first instance, to fashion common law rules to fill in the gaps of section 1983. After considering other federal law, they must look to state law. State law is applied unless it is inconsistent with the purposes of the civil rights act in issue.[311] If there is no applicable state law, then the courts may fashion a federal rule based on the purposes of section 1983. Lower courts generally follow this section 1988 analysis.[312]

Confusion remains, however, regarding when section 1988 is triggered—that is, when section 1983 is deficient—and there are no clear standards to govern a determination of whether state law is consistent with the purposes and policies of section 1983. These issues will be discussed in the next part of this article.

VI. Proposed Application of Section 1988 to the Construction of Section 1983

Section 1983 is not a comprehensive statutory provision, and it provides for few contingencies in its enforcement. Rather, it is a very general expression of a fundamental proposition—the deprivation of civil rights under color of state law will not be tolerated and may be redressed by private, civil actions for damages and equitable relief. Because it does not provide a cohesive scheme for enforcement or execution of the private remedy created, difficult problems of construction and interpretation plague section 1983, often impairing its efficacy as a vehicle for the vindication of civil rights.[313]

The use of section 1988 will not cure all problems inherent in section 1983 construction. Section 1988 nevertheless provides a very pragmatic, procedural approach to the resolution of some issues. It mandates a structure for the construction of section 1983 and establishes some basic guidelines for its application.[314] Analysis under section 1988 improves on

---

[310]This determination is the key distinction between the immunity cases and statute of limitations cases. In the immunity cases, the Court *de facto* concluded that section 1983 and federal law were not deficient by drawing from history and fashioning doctrines in accord with the perceived purposes of section 1983. *See supra* text accompanying notes 98-148. By not recognizing that section 1983 and federal law were deficient in the immunity cases, the Court avoided operation of section 1988.

[311]This article argues that both state common law and statutory law are to be considered pursuant to section 1988. *See supra* text accompanying notes 219-22.

[312]*See* Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984); Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984); McFadden v. Sanchez, 710 F.2d 907 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983); Guyton v. Phillips, 532 F. Supp. 1154 (N.D. Cal. 1981). These cases all refer to, but decline to follow, Professor Eisenberg's restricted use of section 1988.

[313]Section 1983 suits can become bogged down in collateral litigation. Wilson v. Garcia, 105 S. Ct. 1938, 1945 (1985).

[314]Section 1988 also operates in the context of sections 1981 and 1982. For the purposes of this article, section 1988 will only be discussed vis-a-vis its application to section 1983.

the *ad hoc* application section 1983 typified in the immunity cases. As an express congressional command, section 1988 fully justifies consideration of developments in common law after 1871, an issue which has polarized the Court in some section 1983 decisions.[315] Further, section 1988 requires that almost absolute primacy be accorded the basic purposes of section 1983, clearly protecting those purposes from random infringement and erosion by competing policy considerations.[316]

Section 1988 analysis consists of discrete inquiries that are undertaken in serial order: (a) determination of whether or not section 1983 is deficient; (b) determination of whether or not there is any other applicable federal law; (c) examination of state law if other federal law is deficient; (d) application of state law if it is not inconsistent with the purposes of section 1983; and (e) if both federal and state law are inadequate to fill the interstices of section 1983 then the Court may exercise common law powers and fashion a federal rule. The remainder of this article will discuss each of the above steps as they relate to the proposal for a more active role for section 1988 in section 1983 adjudication.

A. Determining the Deficiency of Section 1983

1. Avoidance of the Issue.—The immunity cases present a classic study of heroic attempts by the Supreme Court to find that section 1983 is responsive to many issues which in fact were not addressed in its text or history. Although section 1983's language and legislative history contain no express statements regarding the immunity of governmental officials and in fact indicate a strong presumption that such persons are liable, the Court has purported to find that the section provides for an elaborate scheme of immunity defenses. However, to achieve this the Court has had to consider subsequent developments of policy and law in fashioning a doctrine of immunities for section 1983.[317]

In a non-immunity case, the Court has recognized that a strictly historical approach has not been taken in its decisions:

> [I]n constructing immunities under section 1983, the Court has consistently relied on federal common-law rules. . . . [I]n attributing immunity to prosecutors, *Imbler v. Pactman* . . . to judges, *Pierson v. Ray* . . . ; and to other officials, matters on which the language of section 1983 is silent, we have not felt bound by the tort immunities recognized in the particular forum State and, only after finding an "inconsistency" with federal standards, then considered a uniform federal rule. Instead, the im-

---

[315]See *infra* text accompanying notes 353-62 for discussion of Smith v. Wade, 461 U.S. 30 (1983).

[316]*See infra* text accompanying notes 343 and 367-70.

[317]*See supra* text accompanying notes 99-148.

> munities have been fashioned in light of historic common-law concerns and the policies of the Civil Rights Acts.[318]

The Court has exercised federal common law powers to fashion federal immunities. Although state law frequently informed this exercise of judicial lawmaking, it did not receive the deference it would have commanded under section 1988. The purposes of section 1983 were not weighed against countervailing policies in the manner required by section 1988.

In the immunity cases, the Court engaged in a process of construing section 1983 which expressly relied on its language, which was largely uninfluential,[319] and on its history. Other section 1983 decisions have been rendered on a similar basis.[320] By relying on history,[321] and supplementing it with subsequent developments in law and policy, the Court has effectively concluded that the statute is not deficient and that Congress, in section 1983's one hundred seven words,[322] addressed the questions of executive, prosecutorial, judicial, legislative, police officer, prison guard, school board, municipal and county immunity;[323] whether or not state court actions could be stayed pending federal section 1983 actions;[324] the relationship of section 1983 to habeas corpus;[325] stay of federal court proceedings;[326] nature of damages available under section 1983;[327] the relationship of section 1983 to the eleventh amendment;[328] and the applicability of res judicata and collateral estoppel to section 1983 suits.[329]

Realistically, the forty-second Congress in passing the Ku Klux Klan Act in 1871 did not provide for all these matters in section 1983. Although the Court appears to have conceded as much by considering post-1871 common law and policy developments and by exercising of common law

---

[318]Robertson v. Wegmann, 436 U.S. 584, 597 (1978) (Blackmun, J., dissenting) (citations omitted). For a similar acknowledgment by the Supreme Court, see Carey v. Piphus, 435 U.S. 247, 258 n.13 (1978).

[319]*See supra* text accompanying notes 40-43.

[320]*See, e.g.*, Wilson v. Garcia, 105 S. Ct. 1938 (1985); *see also infra* text accompanying notes 320-29.

[321]*See supra* text accompanying notes 44-79.

[322]See *supra* text accompanying note 5 for text of section 1983.

[323]See *supra* text accompanying notes 99-148 for discussion of immunity cases; *see also* Moore v. County of Alameda, 411 U.S. 693 (1973) (county liability) and discussion of municipal liability in *Monell* and *Monroe, supra* text accompanying notes 20-37 and 51-68.

[324]*See* Mitchum v. Foster, 407 U.S. 225 (1972).

[325]*See* Prieser v. Rodriguez, 411 U.S. 475 (1973).

[326]*See* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964); Railroad Comm'n v. Pullman, 312 U.S. 496 (1941).

[327]*Carey*, 435 U.S. 247.

[328]Quern v. Jordan, 440 U.S. 332 (1979).

[329]Migra v. Warren City School Dist. Bd. Of Education, 465 U.S. 75 (1984); Haring v. Prosise, 462 U.S. 306 (1983); Allen v. McCurry, 449 U.S 90 (1980).

powers,[330] it has not made an express determination of deficiency. Thus, section 1988 has been avoided.

It is abundantly clear that section 1983 is deficient as to most of the foregoing issues. The crux of the section 1988 problem is: in what circumstances should the Court acknowledge this deficiency and turn to section 1988? The mounting frustration of some members of the Supreme Court and lower federal courts with the fantastic voyages through the minds of the forty-second Congress and the legal history of 1871 suggests that increased recognition of section 1988's role is past due. The act of expressly acknowledging that section 1983 is deficient with respect to many issues is all that is required to trigger section 1988.

2. When It Should Be Determined That Section 1988 Is Deficient.— Because "plain meaning" does not play a significant role in the interpretation of section 1983,[331] the determination of deficiency becomes a matter of articulating when reliance on extrinsic aids to construe section 1983 has become so attenuated that it is an unjustifiable basis on which to proceed. Where history reveals that a specific issue was explicitly addressed in congressional debate or was universally established under state and federal common law in 1871, a modern court may be justified in relying upon such sources of law. For example, judicial immunity was firmly entrenched in 1871 in all states. Perhaps it is reasonable to assume that congressmen were aware of such a clearly established rule and would have either discussed it in debate or expressly referred to it in the statutory text if they intended to modify or abrogate it. This is to be distinguished from cases where a common law rule was vague in 1871 and lacked any universal acceptance, such as is the case with the availability of punitive damages.[332]

Even where the existence of a common law rule was notorious in 1871, the problem remains to establish the theoretical justification for asserting that such a rule was incorporated into section 1983.[333] Such incorporation may cause section 1983 to be hamstrung by doctrines that arguably existed in 1871 but which have undergone significant rethinking and evolution in the past century.[334]

Recent section 1983 litigation suggests that very few issues will be resolved on the basis of express and notorious 1871 common law. Even regarding the question of judicial immunity under section 1983, the Court has apparently felt pressed to justify its creation of absolute immunity

---

[330] *See supra* text accompanying notes 99-148.

[331] *See supra* text accompanying notes 38-43.

[332] *See Smith*, 461 U.S. 30, discussed *infra* text accompanying notes 353-62.

[333] *See supra* text accompanying notes 66-77.

[334] *Id.*

by reference to considerations beyond the legal vista of 1871.[335] Where a matter did not have almost universal recognition in 1871, reliance on the "common law of 1871" is misplaced.[336]

Very few section 1983 issues will be found to have been explicitly addressed by members of the House or Senate in their deliberations on section 1983's predecessor.[337] Even when an issue was impliedly discussed, such debates are a dubious source of law for section 1983. For example, the forty-second Congress tangentially considered the question of municipal liability in its debate over the Sherman Amendment to the Ku Klux Klan Act.[338] In *Monroe v. Pape*,[339] the rejection of the Sherman Amendment was interpreted as conclusive proof that Congress did not intend to make municipalities accountable under section 1983.[340] In *Monell v. Department of Social Services*, the Court concluded exactly the opposite after it rejected *Monroe's* reading of this same legislative history.[341] Few issues received even this indirect discussion in the debates of the forty-second Congress. The debates' utility as a source of law for filling in the gaps of section 1983 is therefore minimal.

When a court is called upon to grope beyond the clear and notorious common law of 1871[342] or the express discussion of an issue in the congressional debates of the forty-second Congress, it should acknowledge that section 1983 is deficient. Once this conclusion is reached, section 1988 is triggered and should be utilized by courts in their efforts to apply section 1983.

B. Determination of Whether Other Federal Law Applies

Once it is determined that section 1983 is deficient and section 1988 is triggered, the first inquiry is whether other federal law is available to fill the gaps in section 1983. Any statutory federal law that addresses the

---

[335]*See* Pierson v. Ray, 386 U.S. 547 (1967), discussed *supra* text accompanying notes 99-112.

[336]*See supra* text accompanying notes 78-79.

[337]*See supra* text accompanying notes 44-50.

[338]The Sherman Amendment was rejected by Congress. It would have made municipalities liable for injuries caused by riotous conduct of persons within the city's jurisdiction. *See supra* note 53.

[339]365 U.S. 167.

[340]*Id.* at 188-90.

[341]*Monell*, 436 U.S. at 692 n.57; *see also* Owen v. City of Independence, 445 U.S. 622, 664-65 (1980) (Powell, J., dissenting); Moor v. County of Alameda, 411 U.S. 693, 709-10 (1973).

[342]This will almost always be the case since very few issues will be clearly addressed in the debates or by 1871 common law. With the exception of *Pierson*, 386 U.S. 547, the section 1983 cases surveyed in this article have involved ambiguous congressional debate or divergent analyses of 1871 common law.

deficiency in section 1983 is potentially applicable. Even federal law, however, is applied "only so far as such laws are suitable to carry . . . [section 1983] into effect;" where they are "not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law," they cannot be applied.[343]

Federal statutory law should be presumptively applicable if it addresses an issue on which section 1983 is silent. The standard to overcome the presumptive applicability of such a federal statute should not require the same burden as an implied repeal analysis. Congress in section 1988 prescribed a standard that is less strict than that articulated for implied repeal. Complete incompatibility is not required; rather, the standard is unsuitability. A federal statute should be deemed unsuitable if it can not be adapted to the purposes of section 1983. To determine suitability, courts should decide whether, on the whole, application of the other federal statute would be compatible with the purposes and policies of section 1983.

The Court has often dealt with the question of the applicability of other federal statutes to section 1983 by addressing the issue in terms of implied repeal. For example, in *Allen v. McCurry*,[344] the Supreme Court concluded that section 1983 did not impliedly repeal the Full Faith and Credit statute.[345] Thus, section 1983 was held subject to 28 U.S.C. section 1738's command that state rules of preclusion control federal litigation of civil rights claims.[346]

If the inquiry in *Allen* had been carried out in the manner prescribed by section 1988, it arguably would not have required a finding of implied repeal to avoid the absolute command of section 1738.[347] Rather, a showing that the Full Faith and Credit statute was not suited to the purposes of section 1983 would have sufficed.[348] The language of section 1988 re-

---

[343]42 U.S.C. § 1988 (1982).

[344]449 U.S. 90 (1980).

[345]*Id.* at 97-98.

[346]*Id.* at 99; *see also Migra*, 465 U.S. at 83-85.

[347]Implied repeal is a very high standard. To prevail on a theory of implied repeal, a party must demonstrate that the two statutes cannot be read consistently. In Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985), the Supreme Court indicated that there may be an additional exception to preclusion under section 1738 based on the intent of Congress vis-a-vis the federal statute giving rise to the subsequent action. *Id.* at 1334-35.

[348]Justice Marshall indicated in Haring v. Prosise, 462 U.S. 306 (1983), that additional exceptions to section 1738 could possibly be found based on section 1988. This reference may have been in relation to the test that other federal law must be consistent with section 1983 and, in some circumstances, section 1738 preclusion will not be consistent with the policies underlying section 1983. Justice Marshall's remark may have also been by way of analogy to the limits on the incorporation of state law pursuant to section 1988, i.e. consistency with section 1983, which are not contained in section 1738. *Id.* at 313-14.

quires only a showing of inconsistency with section 1983; it is a lower standard than that required for implied repeal.[349]

There is some question whether federal courts should also consider existing federal common law at this level of section 1988 analysis. *Chardon v. Juan Fumero Soto* is particularly illuminating on this point. Both the majority and dissenting opinions discussed federal case law as potentially supplying an answer to the section 1983 issue before the Court.[350] The majority apparently concluded, because the particular precedent under discussion did not involve section 1983, that it did not supply a rule of law for section 1983. Dissenting, Justice Rehnquist argued that the non-section 1983 case law did apply because it dealt with the same procedural issue before the Court. Both suits raised the question of whether or not a statute of limitations was tolled pending the denial of class certification under rule 23 of the Federal Rules of Civil Procedure.

The language of section 1988 does not differentiate between common law and statutory law where it directs that federal jurisdiction should be exercised in conformity with "the laws" of the United States. While an argument could be made that only statutes and the Constitution are included, it is the position of this author that federal section 1983 decisional law should apply at this level of analysis.[351]

The argument for section 1988 advanced herein is prospective and functional. It is not necessary to disturb existing precedent on a wholesale basis to promote section 1988 as a guide to resolving new issues in section 1983 cases.

Section 1983 decisions, where on point, carry the independent authority of *stare decisis* and thus control in the jurisdiction to which they are relevant. In effect, the presence of section 1983 precedent, if on point, goes to the heart of the deficiency found to exist in section 1983. Therefore, the question of municipal liability, for example, would not be addressed

---

[349]*See infra* text accompanying notes 367-70. Arguably, therefore, the full faith and credit statute would not be applicable to section 1983 claims because strict adoption of state preclusion rules does not always serve the purposes of section 1983.

[350]*See supra* text accompanying notes 258-66.

[351]Section 1988 provides that "federal law" is applicable to section 1983 analysis. Later, section 1988 speaks of the "common law" as modified by state statutes and constitutions. Although it is unclear whether decisional law was expressly incorporated as federal "law," there are at least two arguments for its application. First, since *Erie Railroad Co. v. Tompkins*, court decisions are expressly acknowledged as carrying the authority of law in the jurisdiction to which they relate. The Rules of Decision Act has been construed to require application of state decisional law in diversity suits. *Erie*, 304 U.S. at 79-80; *see also* Eisenberg, *supra* note 17, at 513. Second, case law arising in section 1983 cases carries the authority of *stare decisis*. Other, non-section 1983 decisional law may also be considered in analyzing applicable federal law. The Supreme Court in *Chardon*, 462 U.S. 650, has established some precedent for the proposition that non-section 1983 case law will not be treated as relevant and/or consistent. *Id.* at 662; *see supra* text accompanying notes 264-66.

anew pursuant to state law because available federal law, *Monell*, supplies a rule which is presumptively consistent with the purposes of section 1983. An exception would lie only if authoritative federal precedent was overruled. Pursuant to section 1988, federal section 1983 precedent should be subject to review to determine if it is consistent with the purposes of section 1983. Issues which have not been authoritatively addressed by a court and which are not the subject of a federal statute cannot be resolved by application of federal law.[352]

The first two steps of section 1988 analysis break down into related, discrete inquiries: a) is the matter expressly covered by the language of section 1983; do the debates expressly deal with the issue; was common law in 1871 clear and notorious and did Congress incorporate such common law; and b) does federal statutory law deal with the issue; would its general application be consistent with the underlying purposes of section 1983; and is there available section 1983 federal case law that supplies an answer and is it consistent with the purposes of section 1983?

As an illustration of these initial inquiries, consider the question of the availability of punitive damages under section 1983, which was decided by the Supreme Court in *Smith v. Wade*.[353] Both the majority and dissent therein engaged in extensive forays through the history of section 1983. Justice Brennan, for the majority, expressly stated that post-1871 common law was relevant to the inquiry:

> Justice Rehnquist's dissent faults us for referring to modern tort decisions in construing section 1983. Its argument rests on the unstated and unsupported premise that Congress necessarily intended to freeze into permanent law whatever principles were current in 1871, rather than to incorporate applicable general legal principles as they evolve. . . . The dissents are correct, of course, that when the language of the section and its legislative history provide no clear answer, we have found useful guidance in the law prevailing at the time when section 1983 was enacted; but it does not follow that that law is absolutely controlling, or that current law is irrelevant. On the contrary, if the prevailing view on some point of general law had changed substantially in the intervening century (which is not the case here) we might be highly reluctant to assume that Congress intended to perpetuate a now obsolete doctrine.[354]

---

[352]Although it is the position of this article that as a matter of interpretive process, many section 1983 decisions were wrongly decided, it is not necessary to disturb the body of section 1983 precedent to begin giving appropriate attention to section 1988.

[353]461 U.S. 30 (1983).

[354]*Id.* at 34-35 n.2. Justice Brennan relies on the immunity cases to support this position.

The majority concluded, nonetheless, that punitive damages were available for reckless as well as intentional conduct at 1871 common law.[355] Justice Rehnquist, dissenting, concluded that punitive damages were not available for reckless conduct under 1871 common law.[356] Justice O'Connor, also dissenting, was exasperated with the historical inquiry of both the majority and dissent.[357]

Smith stands as a recent example of a historical construction of section 1983 run amok. According to the model of application advocated in this article, it is clear that the availability of punitive damages for nonintentional conduct was not addressed by section 1983.[358] The majority appears to have acknowledged this: "We noted in *Carey* that there was little in the section's history concerning the damages recoverable for this tort liability."[359] Justice Brennan essentially determined that a uniform federal rule in favor of awarding punitive damages based on reckless conduct was consistent with the purposes of section 1983. Justice Rehnquist, on the other hand, most likely believed that such a rule of damages was not justified and would result in an increased number of section 1983 claims.[360]

Justice O'Connor simply would have rejected the pretense that the result was dictated by history and would have allowed creation of a uniform federal rule against such punitive damages in accord with the result reached by Justice Rehnquist.[361] She noted that the common law status of such punitive damages in 1871 was not readily discernible. Even if it were possible to state with certainty that a particular treatment of the issue prevailed in 1871, Justice O'Connor would not necessarily have allowed such a potentially obsolete rule to control the issue of construction for section 1983.[362]

None of the opinions in *Smith* considered the operation of section 1988. All three opinions effectively exercised common law powers to fill the gap in section 1983. No modern federal or state law was considered as being applicable to the issue or as controlling. Under the model of adjudication advocated in this article, however, the Court is not free to

---

[355] *Id.* at 39-44.

[356] *Id.* at 58-70 (Rehnquist, J., dissenting). Justice Rehnquist imputes knowledge of 1871 common law to the members of the 42nd Congress by stating that most of the congressmen were lawyers and as such must have known what the law was. *Id.* at 66 (Rehnquist, J., dissenting).

[357] *Id.* at 92-94 (O'Connor, J., dissenting). *See supra* text accompanying note 78.

[358] *Id.*

[359] *Id.* at 34 (citations omitted); *see also id.* at 92-93 (O'Connor, J., dissenting).

[360] *Id.* at 90-91 n.17 (Rehnquist, J., dissenting).

[361] *Id.* at 94 (O'Connor, J., dissenting).

[362] *Id.* at 93 (O'Connor, J., dissenting).

exercise common law discretion until it first considers and rejects any potentially applicable federal law. Moreover, after rejecting federal law as a source of guidance, the Court must consider state law pursuant to section 1988.

C. Consideration of State Law

Once a court concludes that federal law is deficient, section 1988 requires the court to consider "the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil . . . cause is held."[363] Both codified and decisional law of the state in which the federal court sits must be considered.[364] Initially, this amounts to no more and no less than the task confronting federal courts in diversity suits.

Section 1988 was designed to allow the interplay of state law in the enforcement of federal civil rights where state law was at least as protective of civil rights as federal law. At this level of section 1988 application, the court must attempt to identify state law which is arguably relevant to the issue presented by the civil rights litigation. The court should be guided by the characterization of section 1983 as a personal injury or tort-like provision when reviewing state law.[365]

D. State Law Is Applied Unless It Is Inconsistent with Section 1983

Once a court has identified analogous state law, it is required to apply such law to the section 1983 case unless its use would be inconsistent with the "Constitution and laws of the United States."[366] Analysis of a state law's consistency with federal law must focus on the purposes of section 1983.[367] Further, the section 1988 precedent previously discussed indicates that this inquiry is not limited to the outcome of a specific case but, rather, concerns the operation of a specific state rule vis-a-vis section 1983 generally.[368] Where the use of state law would substantially undermine the fundamental purposes of section 1983, such law should be found to be inconsistent with federal law.

---

[363]42 U.S.C. § 1988 (1982).

[364]*See supra* text accompanying notes 212-22.

[365]This characterization of section 1983 was pronounced in Wilson v. Garcia. *See supra* text accompanying notes 271-77. In addition, given the clear purpose of section 1983, to render state actors liable, the court should also contemplate the applicability of provisions found in state tort claims acts.

[366]42 U.S.C. § 1988 (1982).

[367]*See supra* text accompanying notes 80-97.

[368]*See supra* text accompanying notes 243-311.

Where state law is found to be inconsistent with the purposes of section 1983, arguments in favor of its application, premised on federalism, must be rejected. Section 1988 embodies federalism principles. It defines the deference to be accorded state law in section 1983 cases; if section 1988 has been properly applied, federalism concerns will be fully served.

The other end of federalism tension—the need for national uniformity—is also accommodated at this step of section 1988 application. When a court considers whether application of a state law rule would be inconsistent, generally, with section 1983, it is attempting to preserve and fulfill the purposes of the civil rights law. If the court concludes that, again generally, the very fact of application of different rules vis-a-vis a particular matter would itself be inconsistent with the purposes of section 1983, that may be cause to reject state law, regardless of its specific content. National uniformity may at times be inextricably linked to the fundamental purposes of section 1983 which are primary in section 1988.

For example, in *Garcia* the Court was appropriately concerned that the lack of a uniform characterization of section 1983, for the purpose of determining the most analogous state statute of limitations, seriously threatened section 1983's efficacy as a remedial provision. Because the confusion and delay generated by attempts to characterize section 1983 were inconsistent with the purposes of section 1983, the Court went no further than to designate all section 1983 actions as personal injury actions as a matter of federal common law.[369] It did not prescribe a uniform statute of limitations as a matter of federal law. Rather, it preserved the *Tomanio* rule that pursuant to section 1988, state statutes of limitations apply. This indicates that only very serious threats to the fundamental purposes of section 1983 will be sufficient to preclude the application of state law that is itself not inconsistent with section 1983.

In *Smith v. Wade*, if Missouri law allowed punitive damages to be awarded in personal injury actions based on reckless conduct, there would be nothing inconsistent with applying such state law to the section 1983 action. The purposes of section 1983 would in no way be undermined, and in fact, the purpose to deter violations of civil rights would be promoted. If, however, under Missouri law no punitive damages were available in an analogous situation, then the court would have to consider whether this denial of punitive damages abrogated the purposes of section 1983, most specifically, section 1983's purpose to deter violations of constitutional rights. On balance, even though deterrence would not be furthered by a prohibitive Missouri law, neither would section 1983's deterrent purpose be impaired, since compensatory damages and equitable relief would remain available remedies. Thus, it would not be inconsistent with the purposes of section 1983 to apply state law of punitive damages regardless of its content.

---

[369] *Garcia*, 105 S. Ct. at 1945-47.

E. Creation of Federal Common Law

When no federal or state law is applicable pursuant to the foregoing analysis, a court must exercise its common law powers to resolve the section 1983 construction issue. For example, assume arguendo that there were no federal doctrine of immunity for executive officials; if state law abrogated executive immunity, application of such state law would be fully consistent with the purposes of section 1983. On the other hand, if state law provided that executive officials were absolutely immune from liability, such an immunity would be inconsistent with the purpose of section 1983 to make state actors liable. Because absolute immunity would be clearly inconsistent with the purposes of section 1983, this state law rule would be inapplicable pursuant to section 1988. The federal court would then have to fashion a rule taking into consideration the purposes of section 1983.

Essentially, this is what the Court did in the immunity cases. However, under the section 1988 proposal advocated herein, the Court must, in the first instance, be guided by the purposes of section 1983. Section 1988 requires that these purposes be given very high priority when balanced against other policy considerations. Section 1988 analysis differs from the methodology in the immunity cases by shifting the focus away from history and emphasizing the purposes of section 1983.

IV. Conclusion

Utilization of section 1988 as a rule of construction for section 1983 cases provides clarity to lower federal courts regarding the process of construing section 1983. It justifies the consideration of modern common law developments while placing appropriate limits on the operation of such law. Further, as a federalism provision, it strikes a balance between state and federal law in the civil rights enforcement scheme. Hence, comity is served and states' interests are protected through the required deference towards state law. The integrity of section 1983 is guaranteed by granting primacy to its fundamental purposes.

Notes

Computer Simulations: How They Can Be Used at Trial and the Arguments for Admissibility

I. Introduction

As litigation has become more complex, attorneys are constantly seeking new techniques to prove their cases. As a result, many litigators are turning to new forms of evidence to help explain and dramatize the evidence they must rely upon to persuade the judge or jury. One type of evidence considered to have great promise for this purpose is the computer simulation. In a computer simulation, data which is representative of actual events is manipulated by the computer to produce an animated simulation capable of display in the courtroom.[1]

The evidence is generally introduced for the purpose of simplifying potentially technical areas.[2] Thus, it may prove to be particularly useful in mid-air collision cases, wake turbulence cases, weather-related cases, automobile accident litigation, and admiralty cases.[3] These types of cases are particularly well-suited for the use of computer simulation techniques because they contain issues of movement and perspective. The computer simulation can supply the element of motion, thereby enabling visualization by the jury. Two simulation techniques can be utilized for different purposes depending upon the needs of the attorney: computer-generated reconstructions and computer-generated visualizations.[4] The reconstruction can demonstrate the movement of many objects in a three-dimensional world, while computer-generated visualizations present a three-dimensional scene.[5] This Note will consider the potential uses of computer simulations, with a brief discussion of the technical aspect of producing a simulation. The main focus of the Note, however, will be a practical consideration of the admissibility problems an attorney may face upon introduction of evidence utilizing such techniques. Further, the Note will focus on potential arguments the attorney may advance in order to lay a proper foundation for the introduction of the computer simulation under common law principles of demonstrative evidence, the *Frye* stand-

---

[1]Schaeffer v. General Motors Corp., 372 Mass. 171, 177, 360 N.E.2d 1062, 1066-67 (1977).

[2]Dombroff, *Demonstrative Evidence*, Trial, July 1982, at 52.

[3]*Id.*

[4]*Id.*

[5]*Id.*

ard of general acceptance,[6] and the relevance/balancing test of the Federal Rules of Evidence.[7]

II. Background Information on Litigation Uses and Simulation Preparation

Several reported cases where parties have sought to present computer simulation evidence are illustrative of the potential uses at trial.[8] Although computer simulations are probably best suited for accident reconstruction in tort litigation, simulations have also been used to demonstrate the perfectibility of a product, to reconstruct an accident in a criminal trial, to demonstrate the ability of a product to function as it was intended, and to calculate the fair market value of land in an eminent domain proceeding.[9]

In *Perma Research and Development v. Singer Co.*,[10] Perma had assigned a patent to Singer to perfect, manufacture, and market an anti-skid device. Perma brought an action for Singer's breach of contractual obligation to use its best efforts to perform those functions. Singer's defense was an abandonment of contract claiming the device was not perfectible. Perma was permitted to present expert testimony based on computer simulations indicating that the anti-skid device was perfectible. As a result, Perma was awarded nearly seven million dollars in damages.[11]

In *People v. McHugh*,[12] defense counsel presented a computer reenactment of a car accident which resulted in the death of four teenagers. The experts closely examined the accident scene and the police reports to determine where the wreckage was found, where the car hit the wall, and finally, where McHugh and the four bodies were found. Then, the experts applied the laws of physics to the observed data. They found that the observed data did not correspond to the prosecution's version of the accident, which surmised that McHugh, apparently drunk at the wheel, lost control of his Mustang at eighty miles per hour and slammed into the wall. Instead, they concluded that the only way the accident could have happened was if the car, going forty-five miles per hour, slid off the rain-slick roadway, hit an uncovered manhole, and slammed into the wall. The experts determined that if the manhole had not been

---

[6]Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[7]Fed. R. Evid. 403.

[8]United States v. 1,606.00 Acres of Land, Etc., 698 F.2d 402 (10th Cir. 1983); Perma Research and Dev. v. Singer Co., 542 F.2d 111 (2d Cir.), *cert. denied*, 429 U.S. 987 (1976); Holland v. Dick Youngberg Chevrolet, 348 N.W.2d 770 (Minn. App. 1984); People v. McHugh, 124 Misc. 2d 559, 476 N.Y.S.2d 721 (N.Y. Sup. Ct. 1984).

[9]*See infra* notes 10-20 and accompanying text.

[10]542 F.2d 111 (2d Cir.), *cert. denied*, 429 U.S. 987 (1976).

[11]*Id.* at 113.

[12]124 Misc. 2d 559, 476 N.Y.S.2d 721 (N.Y. Sup. Ct. 1984).

left uncovered, the accident could have been avoided.[13] The simulation was introduced into evidence and the jury acquitted McHugh of four counts of manslaughter.[14]

The Minnesota Court of Appeals allowed the introduction of a computer simulation in *Holland v. Dick Youngberg Chevrolet*.[15] The case concerned a revocation of acceptance of a contract, based on inadequate power of a truck to haul a full load. The appellant car dealership offered the simulation to show that its truck could haul 50,000 pounds at highway speed.[16] Despite the fact that the evidence was admitted, the jury concluded that the truck lacked power and that this lack of power was a substantial impairment that interfered with the purpose for which the truck was purchased.[17] Consequently, Holland was permitted to revoke his acceptance.[18]

Another use of simulation at trial was demonstrated in *United States v. 1,606.00 Acres of Land, Etc.*[19] The United States brought an eminent domain action to subordinate all oil, gas, and other mineral rights on certain tracts of land to the right of the United States to flood the tracts as necessary for construction or operation of a reservoir. In order to aid in the determination of fair market value, the royalty owners presented an expert who gave extensive testimony based on computer simulations of the various present worths of the royalty interests under five wells depending upon certain price conditions for the products.[20]

Further, simulation techniques are frequently used to reconstruct accidents.[21] Post-accident data such as the friction co-efficient of the pavement and the length of the skid marks are programmed into the computer.[22] "By trial and error, the computer . . . then determine[s] what impact speed would yield a reconstruction most consistent with this physical evidence."[23] The computer program assigns to the variables values that most closely correspond with the observed data.[24]

---

[13]Harper, *Computer Evidence Is Coming*, A.B.A. J., Nov. 1984, at 80, 84.

[14]*McHugh*, 124 Misc. 2d at 560, 476 N.Y.S.2d at 723.

[15]348 N.W.2d 770 (Minn. App. 1984).

[16]*Id.* at 774.

[17]*Id.* at 775.

[18]*Id.* at 776.

[19]698 F.2d 402 (10th Cir. 1983).

[20]*Id.* at 403-04.

[21]Dombroff, *supra* note 2.

[22]*See* Schaeffer v. General Motors Corp., 372 Mass. 171, 177, 360 N.E.2d 1062, 1066-67 (1977).

[23]*Id.* at 177, 360 N.E.2d at 1067.

[24]*See, e.g.*, Starr v. Campos, 134 Ariz. 254, 655 P.2d 794 (1982) (scientific evidence may be admitted if it is derived from principles and procedures that have achieved general acceptance — widespread use is without significant objection from the relevant scientific community); Schaeffer v. General Motors Corp., 372 Mass. 171, 360 N.E.2d 1062 (1977) (before simulation results can be admitted, the judge must conduct a hearing in the absence of the jury to determine if the evidence meets the prescribed standards for admissibility).

A final reported case involving computer simulations is *McDonnell Douglas Corp. v. United States*.[25] McDonnell Douglas introduced computer simulations to demonstrate a reduction to practice of a missile for which they sought a patent. A reduction to practice for purposes of patentability is accomplished when the inventor's conception is embodied in such a form as to render it capable of practical and successful use.[26] The court found the computer simulations inadequate to prove a reduction to practice because subsequent physical testing had revealed significant flaws in design.[27] However, the court did not rule out the possible future use of computer simulations to demonstrate a reduction to practice absent subsequent contrary physical tests. The above examples provide a sample of potential uses of computer simulations at trial, but they are by no means conclusive or exhaustive.[28]

Aviation accidents, for example, are well suited for the use of computer simulations because they "involve the analysis of the movements of many objects in a three-dimensional world with critical events occurring at known times."[29] Additionally, reconstruction of mid-air collisions is illustrative of the general process used for all types of simulation construction. The first step is a computation of the flight paths of the aircraft.[30] Known data is programmed into the computer to calculate either location or velocity, heading and rate of climb or descent.[31] The computer is also programmed with the mathematical formulas necessary to determine the bank angle and turn radius from the known variables.[32]

The flight paths are then superimposed on a map of the collision area with a symbol by each aircraft to indicate the time at which the

---

[25]670 F.2d 156 (Ct. Cl. 1982).

[26]BLACK'S LAW DICTIONARY 1150 (5th ed. 1979).

[27]*McDonnell Douglas Corp.*, 670 F.2d at 161.

[28]Interview with Michael Pape, engineer, Wolf Technical Services, Inc., Indianapolis, Ind. (September 13, 1985). Mr. Pape discussed several simulations prepared by that company for purposes of litigation. One case concerned negligence on the part of a city in piling snow next to a guardrail. The driver of a Jeep lost control of his vehicle on a slippery street, ran into the piled-up snow, and was launched onto the street below an overpass, suffering severe injuries. By collecting post-accident data, the engineers were able to reconstruct the accident and to demonstrate that if the snow had not been present, the Jeep would have skidded along the guardrail and returned to the roadway thereby greatly reducing the injuries of the driver. The simulation serves the important function of demonstrating the "what if" possibilities of an accident, by providing for recreation under different circumstances.

The engineers at Wolf Technical Services were also able to use a computer simulation to determine the murder weapon in a beating case. Working in conjunction with doctors, the engineers established a pattern of the blows and thereby positively determined that the murder weapon was a tennis shoe.

[29]Dombroff, *supra* note 2, at 52.

[30]*Id.*

[31]*Id.*

[32]*Id.*

aircraft occupied that position.[33] During trial, this figure can be used to explain time and distance factors relating to the accident. Further, it can be used with eyewitness testimony to explain the relative positions of the aircraft.

The next step in aircraft accident analysis is to prepare a cockpit field of view from each aircraft to determine whether any part of the aircraft structure obstructed the pilot's view of the other aircraft.[34] The computer can generate photographs that depict on a progressive basis what each pilot and the air traffic controller could see from his vantage point.[35] This figure may be used in conjunction with an expert pilot witness to determine which one of the pilots had the time to "see and avoid" the accident.[36]

Computer-generated graphic visualizations should be useful where questions of three-dimensional perspectives arise.[37] Assume you are representing a driver involved in a rear-end collision. There is a question of whether your client could see a road sign off to the side of the road in front of the first car.[38] The computer can make three-dimensional representations of the objects in interest, presenting the scene from any point of view, for example, your client's point of view.[39] After the program is complete, distances between the cars and the sign can be freely changed.[40] By assuming starting points and velocities for each car, a time sequence of pictures can be produced.[41]

III. General Observations on Potential Admission Standards for Computer Simulations

There are few reported cases dealing specifically with the admissibility of computer simulations; however, *Perma Research and Development v. Singer Co.*[42] is an important decision which considered the admissibility and use of simulations. In *Perma*, the Court of Appeals for the Second Circuit upheld the trial court's admission of expert testimony based on computer simulations.[43] The testimony was offered to refute Singer's defense that the anti-skid device was not perfectible, and consequently

---

[33] *Id.* at 53.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 54.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] 542 F.2d 111 (2d Cir.), *cert. denied*, 429 U.S. 987 (1976).
[43] *Id.* at 115.

Singer was not in breach of contract for failing to use its best efforts to develop, perfect, and market the device.[44]

Singer objected to the introduction of the testimony on the ground that it had not been given the underlying data and computer programs prior to trial and consequently did not have an adequate basis for cross-examination.[45] In upholding the admission of the evidence and affirming the trial court, the appellate court said:

> While it might have been better practice for opposing counsel to arrange for the delivery of all details of the underlying data and theorems employed in these simulations in advance of trial to both avoid unnecessarily belabored discussion of highly technical, tangential issues at trial, Fed. R. Civ. P. 26(b)(4)(A), and protect truly prop[r]ietary aspects of the programs . . . . The trial judge did not abuse his discretion in allowing the experts to testify as to this particular basis for their ultimate conclusion that the Perma device was indeed perfectible.[46]

The court did not specifically discuss the process under which it provided for the admission of the evidence based on the simulations. Nevertheless, the evidence was admitted and Perma recovered seven million dollars,[47] a recovery based almost exclusively on expert testimony.

In determining an admission process for computer simulations, a trial judge will undoubtedly have several concerns. As Frederick B. Lacey, a United States district court judge, said:

> Three questions face a judge who must decide whether scientific evidence is admissible at trial. First, is the underlying scientific principle valid? . . . The second inquiry is: Is the technique applying the scientific principle valid? . . . Finally, assuming that a valid technique does exist, the judge must ask: Was the technique applied properly on this particular occasion; that is, does the person applying the technique have the necessary skills to apply and to interpret the results of the technique?[48]

Within the framework of these three questions, the trial judge must determine the appropriate standard for evaluating the scientific principle and the technique applying it.[49] Three possible standards face the trial judge: a common law approach to demonstrative evidence, the *Frye* standard of general acceptance in the relevant scientific community, and

---

[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at 113.
[48] Lacey, *Scientific Evidence*, 24 JURIMETRICS J. 254, 255 (1984).
[49] *Id.*

a relevancy/balancing test.[50] Each standard is different in terms of its operation and the considerations each requires for admission.

Under a common law approach to demonstrative evidence, the test for admissibility is two-fold: is the object relevant to some issue in the case and is it actually explanatory of something that is important for the jury to understand?[51] The second possible admission standard, the *Frye* standard of general acceptance in the relevant scientific community, was promulgated by the United States Court of Appeals for the District of Columbia Circuit in 1923.[52] Finally, the judge may apply the relevancy/balancing approach suggested by the Federal Rules of Evidence, whereby relevant evidence is admissible provided its probative value is not outweighed by prejudice, potential to mislead the jury, or consumption of time.[53] Within each of these standards there is a logical argument for the admissibility of computer simulations. As Dean McCormick wrote, "[t]he manifest destiny of evidence law is a progressive lowering of the barriers of truth."[54]

IV. Admissibility Argument Under Each of the Proposed Admission Standards on Litigation Uses and Simulation Preparation

A. The Common Law Principles of Demonstrative Evidence

In *People v. McHugh*,[55] a case involving the introduction of a computer reenactment of a car accident, the New York Supreme Court stated:

> The evidence sought to be introduced here is more akin to a chart or diagram than a scientific device. Whether a diagram is hand drawn or mechanicaly drawn by means of a computer is of no importance . . . . A computer is not a gimmick and the court should not be shy about its use, when proper. Computers are simply mechanical tools — receiving information and acting on instructions at lightning speed. When the results are useful, they should be accepted, when confusing, they should be rejected. What is important is that the presentation be relevant to a possible defense, that it fairly and accurately reflect the oral

---

[50]*See generally* People v. McHugh, 124 Misc. 2d 559, 476 N.Y.S.2d 721 (N.Y. Sup. Ct. 1984) (admitting a computer simulation as demonstrative evidence); Lacey, *supra* note 48 (discussing the *Frye* standard and the relevancy/balancing test).

[51]Smith v. Ohio Oil Co., 10 Ill. App. 2d 67, 71, 134 N.E.2d 526, 530 (1956).

[52]Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[53]Fed. R. Evid. 401-403.

[54]McCormick, Handbook of the Law of Evidence 165 (1st ed. 1954).

[55]124 Misc. 2d 559, 476 N.Y.S.2d 721 (N.Y. Sup. Ct. 1984).

> testimony offered and that it be an aid to the jury's understanding of the issue.[56]

Thus, a computer simulation was held to be admissible in *McHugh* on the theory that it was more similar to demonstrative evidence resulting from a scientific principle than to real evidence.

Demonstrative evidence has been defined as "[t]hat evidence addressed directly to the senses without intervention of testimony."[57] The probative value of this evidence centers on its ability to aid the jury in comprehending the testimony of a witness. "Demonstrative evidence is evidence offered for the purpose of illustration and clarification. The theory justifying admission of this type of evidence requires only that the item be sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact."[58]

Demonstrative evidence, thus, must be illustrative and explanatory of a relevant issue in the case to be admissible. The general standard for relevance is whether the evidence has a logical tendency to make the existence of any fact of consequence to the determination of the action more or less probable.[59] Most jurisdictions have readily admitted demonstrative evidence, provided the party who offered the evidence laid an adequate foundation for it.[60] The desirability of giving the jury the best possible understanding of the subject on which it is to pass seems to have outweighed the concern that such evidence will have a prejudicial effect.[61] Nonetheless, courts do require that a foundation be laid, and generally, it is within the discretion of the trial judge to determine what constitutes an adequate foundation.[62]

As a rule of thumb, the litigator seeking to introduce a computer simulation can utilize specific strategies to help ensure that the court will find an adequate foundation. Courts will likely consider the accuracy of the simulation with a test of whether the evidence is sufficient to

---

[56]*Id.* at 560, 476 N.Y.S.2d at 722-23.

[57]BLACK'S LAW DICTIONARY 389 (5th ed. 1979).

[58]Pilkington v. Hendricks County Rural Elec. Co., 460 N.E.2d 1000, 1010 (Ind. Ct. App. 1984) (quoting MCCORMICK, EVIDENCE § 212 (1972)). *See generally* Slow Dev. Co. v. Coulter, 88 Ariz. 122, 353 P.2d 890 (1960); McKee v. Chase, 73 Idaho 491, 253 P.2d 787 (1953); Smith v. Ohio Oil Co., 10 Ill. App. 2d 67, 134 N.E.2d 526 (1956).

[59]*See generally* Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982); United States v. Carter, 522 F.2d 666 (D.C. Cir. 1975); Papizzo v. O. Robertson Transp. Ltd., 401 F. Supp. 540 (E.D. Mich. 1975); *In re* Marriage of Gray, 422 N.E.2d 696 (Ind. Ct. App. 1981).

[60]Moore, *Basic Practice Guide for Demonstrative, Experimental, and Scientific Evidence*, 50 INS. COUNS. J. 279, 281 (1983).

[61]Smith v. Ohio Oil Co., 10 Ill. App. 2d 67, 134 N.E.2d 526 (1956); *see also* Stath v. Williams, 174 Ind. App. 369, 367 N.E.2d 1120 (1977); Moore, *supra* note 60.

[62]Moore, *supra* note 60.

provide an adequate foundation assuring the accuracy of the process.[63] Consequently, the attorney can work toward laying a proper foundation by describing how the computer system operates and by showing that the evidence produced was accurate.[64] Utilization of a test program with known results would be extremely helpful in this regard.[65] Further, it is necessary to consider the flow of information into, through, and out of the computer system.[66] All steps in the processing and storage of information should be reviewed.[67] The litigator must demonstrate that the program provides for every contingency. He should show that, if the computer encounters data it does not know how to process, the data will be flagged instead of erroneously processed.[68] Finally, the simulation program should contain verification procedures and safeguards to eliminate potential sources of error at each step in the information flow.[69]

As a final measure to ensure admissibility, the computer simulation should be adopted by the expert witness as substantially correct in order to be formally introduced as part of the witness' testimony, in which it is incorporated by reference.[70] Another essential element preceding the introduction of demonstrative evidence is having the witness affirm that the illustrative evidence is a reasonable, accurate representation of his testimony.[71] Thus, if a litigator lays an adequate foundation and presents expert testimony adopting the evidence as accurate and reliable, a computer simulation should be admissible as demonstrative evidence.

B. The Frye *Standard of General Acceptance*

1. Statement of the Standard. — In *Frye v. United States*,[72] the Court of Appeals for the District of Columbia Circuit excluded expert testimony based on a "systolic blood pressure deception test," a forerunner of the modern polygraph. The court wrote:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to

---

[63]Ferguson v. Commonwealth, 212 Va. 745, 187 S.E.2d 189 (1972), *cert. denied*, 409 U.S. 861 (1972); 3 WIGMORE, EVIDENCE § 790 (1970).

[64]*See* Roberts, *A Practitioner's Primer on Computer-Generated Evidence*, 41 U. CHI. L. REV. 254, 256-63 (1974); Sprowl, *Evaluating the Credibility of Computer-Generated Evidence*, 52 CHI.[-]KENT L. REV. 547, 557-60 (1976).

[65]*Sprowl*, *supra* note 64, at 557-60.

[66]*Id.*

[67]*Id.*

[68]*Id.*

[69]*Id.*

[70]Hanford v. Cole, 402 P.2d 209 (Wyo. 1965); *see also* Payne v. Jones, 284 Ala. 196, 224 So. 2d 230 (1969); Jones v. State, 269 Ind. 543, 381 N.E.2d 1064 (1978).

[71]Jones v. State, 269 Ind. 543, 545-46, 381 N.E.2d 1064, 1066 (1978).

[72]293 F. 1013 (D.C. Cir. 1923).

> define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[73]

Under the *Frye* standard, it is not sufficient for a qualified expert or even several experts to testify that a particular scientific technique is valid; *Frye* imposes a special burden — the technique must be generally accepted in the relevant scientific community.[74]

The perceived benefits of *Frye* center on its conservative nature and the fact that it excludes evidence that is not proven to be sufficiently accurate. Proponents of the *Frye* standard assert that the principal justification for the standard is that it screens out unreliable scientific evidence, providing for greater accuracy and fairness at trial.[75]

A blistering dissent in *Perma Research and Development v. Singer Co.*[76] by Judge Van Graafeiland summarized many of the concerns that accompany the use of computer simulations as a basis for testimony, concerns that closely mesh with the concerns of *Frye* proponents. He argued that the simulations and the testimony based thereon should not be admitted because the plaintiff's failure to disclose the programs denied the defendant the right to cross-examine the expert; a proper foundation was lacking because the algorithm used in the simulation was apparently based on hearsay; the simulation was not broad enough because it failed to provide for changes in models, cars, road surfaces, road grades, weather, and altitudes; and finally, the testimony was merely speculation, since there were no parallel experiments to establish the simulation's reliability.[77] Van Graafeiland further stated his concern for the use of simulations:

> Although the computer has tremendous potential for improving our system of justice by generating more meaningful evidence than was previously available, it presents a real danger of being the vehicle of introducing erroneous, misleading, or unreliable evidence. The possibility of an undetected error in computer-generated evidence is a function of many factors: the underlying data may be hearsay; errors may be introduced in any one of several stages of processing; the computer might be erroneously

---

[73] *Id.* at 1014.

[74] Giannelli, *Symposium on Science and Rules of Evidence*, 99 F.R.D. 188, 189 (1983).

[75] *Id.* at 191.

[76] 542 F.2d 111, 116 (1976) (Van Graafeiland, J., dissenting).

[77] *Id.* at 121-24.

> programmed, programmed to permit an error to go undetected, or programmed to introduce error into the data; and the computer may inaccurately display the data or display it in a biased manner.[78]

Proponents of the *Frye* standard argue further that it is necessary to avoid the "misleading aura of certainty which often envelops a new scientific process."[79] The *Frye* standard is viewed as a means of excluding evidence to which lay jurors often attribute a mystical infallibility.[80]

In two cases, *Schaeffer v. General Motors*[81] and *Starr v. Campos*,[82] state supreme courts have prevented the admission of computer simulations at the trial court level, with each court calling for a *Frye* hearing prior to future introduction. In *Schaeffer*, the plaintiff, whose car crossed the center line and hit an oncoming vehicle, brought an action for negligence in the manufacture and design of an optional differential. An optional differential is an arrangement of gears permitting the rotation of two shafts at different speeds, providing for different rates of wheel rotation on curves. The defendant introduced a computer simulation of the accident, which purported to show that the differential did not adversely affect the operation of the plaintiff's automobile. The Supreme Judicial Court of Massachusetts stated its concern with the trial judge's admission of the evidence:

> Our concern is not with the precision of electronic calculations, but with the accuracy and completeness of the initial data and equations which are used as ingredients of the computer program. More generally, we feel that the standard for admissibility of scientific tests may not have been met in this instance. That standard was clearly enunciated in *Commonwealth v. Fatalo*: "Judicial acceptance of a theory or instrument can occur only when it follows a general acceptance by the community of scientists involved."[83]

The court was concerned because the authorities cited by the parties were in substantial disagreement as to the reliability of the computer simulation. Thus, the court promulgated a two-part process to aid in

---

[78]*Id.* at 125 (quoting Roberts, *A Practitioner's Primer on Computer-Generated Evidence*, 41 U. CHI. L. REV. 254, 255-56 (1974)).

[79]People v. Kelly, 17 Cal. 3d 24, 32, 549 P.2d 1240, 1245, 130 Cal. Rptr. 144, 149 (1976) (quoting Huntingdon v. Crowley, 64 Cal. 2d 647, 656, 414 P.2d 382, 390, 51 Cal. Rptr. 254, 262 (1966)).

[80]United States v. Addison, 498 F.2d 741 (D.C. Cir. 1974).

[81]372 Mass. 171, 360 N.E.2d 1062 (1977).

[82]134 Ariz. 254, 655 P.2d 794 (1982).

[83]*Schaeffer*, 372 Mass. at 177-78, 360 N.E.2d at 1067 (citation omitted).

the judge's determination of whether such evidence is admissible. The court established that the judge should:

> (a) Conduct a hearing in the absence of the jury on the question whether the tests conducted and results ascribed thereto meet the prescribed [general acceptance] standards for admissibility of such evidence, and
>
> (b) that he put into the record, by dictation, for the transcript or otherwise, the findings of fact made by him as the basis for the admission or exclusion of the evidence in question.[84]

Thus, although the simulation was excluded, on remand it could possibly be admitted after the hearing.

In *Starr v. Campos*,[85] the Arizona Supreme Court was not convinced that the trial court had used the appropriate standard for determining admissibility. Scientific evidence is only to be admitted in Arizona if it is derived from principles and procedures that have achieved general acceptance in their respective scientific fields.[86] Under this standard, according to the *Starr* court, "it is not sufficient that any one expert relies upon the technique in question or that the technique is 'widely used,' unless that widespread use is without significant objection from the relevant scientific community."[87] As a result, the court established the guidelines that would control subsequent offerings of this type of evidence:

> [T]he court is directed to apply the *Frye* standard and determine specifically, in the absence of the jury, whether the procedure used to obtain that evidence is generally accepted among scientists in the relevant fields, including accident reconstruction and automotive engineering. In making this determination *the court may take judicial notice* of the ability of a properly programmed computer to perform mathematical computation and of *the general acceptance of the underlying principle of the method, the law of conservation of linear momentum*. It will only be necessary to determine whether those of sufficient training and experience to judge are in general agreement that the program properly applies that principle (and any others it may involve) to automobile collisions.[88]

---

[84] *Id.*

[85] 134 Ariz. 254, 655 P.2d 794 (1982).

[86] State v. Mena, 128 Ariz. 226, 231, 624 P.2d 1274, 1279 (1982).

[87] 134 Ariz. at 257, 655 P.2d at 797.

[88] *Id.* at 257-58, 655 P.2d at 797-98 (emphasis added).

Again, the court here did not rule out the possibility of admission of the simulations on remand; it merely called for a *Frye* hearing prior to such admission in the future.

Frye is not without criticism. *Schaeffer*[89] and *Starr*[90] are indicative of one of the problems opponents perceive in the use of *Frye*, the vague nature of "general acceptance." Is general acceptance required of the underlying theory or of the technique applying it? Case law is far from clear on this point.[91] The *Schaeffer* court requires a demonstration of general acceptance of the underlying theory, that is, of "the accuracy and completeness of the computer program."[92] The *Starr* court, however, permits the trial court to take judicial notice of the underlying principles of computer simulation. This court's general acceptance requirement extends only to a determination of whether there is general acceptance of the technique applying the principles to automobile collisions.[93]

A second perceived problem with the *Frye* standard results from the difficulty courts have had in identifying the relevant scientific community; "the question is whether to identify the field as embracing a broad category . . . or to limit it in some way."[94] The *Frye* rule "does not disclose the *scope* of the scientific community in any given area of scientific evidence."[95] Thus, "under the *Frye* definition the scope of the scientific community could be so large in any given area of science as to render 'general acceptance' for any new development practically impossible."[96]

Cases concerning the admissibility of spectrographic evidence illustrate how a broad versus a narrow definition of the relevant scientific community affects the ultimate admissibility decision. In *Commonwealth v. Lykus*[97] and *Hodo v. Superior Court*,[98] spectrographic evidence[99] was held to be admissible. The court in each case interpreted the relevant scientific community to be "those who would be expected to be familiar

---

[89]372 Mass. 171, 360 N.E.2d 1062 (1977).

[90]134 Ariz. 254, 655 P.2d 794 (1982).

[91]Lacey, *supra* note 48, at 261-62.

[92]372 Mass. at 177-78, 360 N.E.2d at 1067.

[93]134 Ariz. at 258, 655 P.2d at 798.

[94]Lacey, *supra* note 48, at 261.

[95]Note, *Evidence—Spectrographic Method of Voice Identification — Tendency of the Courts Toward Admitting Scientific Evidence*, 12 WAKE FOREST L. REV. 879, 884 (1976).

[96]*Id.* at 885.

[97]367 Mass. 191, 327 N.E.2d 671 (1975).

[98]30 Cal. App. 3d 778, 106 Cal. Rptr. 547 (1973).

[99]BLACK'S LAW DICTIONARY 1255 (5th ed. 1979) defines a spectrograph as voice print analysis used as a method of identification based on the comparison of graphic representations or "spectrograms" made of human voices.

with its use,"[100] who conduct research in spectrographic analysis, who employ the identification technique, and who are familiar with the particular process involved.[101]

In contrast, spectrographic evidence was held to be inadmissible in *Cornett v. State*[102] and *United States v. Addison*[103] for its failure to attain general acceptance. Each of these courts required acceptance by a majority of all scientists who study and conduct research in the general field of phonetics.[104] This broad definition of the relevant scientific community resulted in the exclusion of the evidence. Thus, a court's definition of the relevant scientific community frequently proves to be the factor determinative of admissibility. Nonetheless, *Frye* is silent as to the actual meaning of the term and its opponents consider this omission to be a major weakness in the standard.

A final perceived problem with the use of *Frye* is that it functions to keep valuable, reliable evidence from the trier of fact.[105] Jurisdictions that rely on this standard for admissibility "lag behind the advances of science, while the courts wait for novel scientific techniques to win general acceptance."[106] "*Frye* frustrates rather that enhances that search for the truth."[107]

Because of the conservative nature of the *Frye* standard, the litigator will face the most difficulty in admitting computer simulations in a *Frye* jurisdiction. The admissibility of such evidence is not necessarily precluded, however, by the standard. If the attorney irrefutably establishes the accuracy of the simulation process and the credibility of the expert witness and further demonstrates that the simulation is based upon theories long recognized under the laws of physics, there is an excellent chance that the simulation will be admitted even under the stricter *Frye* standard. No case actually indicates that simulations are inadmissible under *Frye*; rather the cases mandate a hearing to determine if simulations meet the *Frye* requirements.

2. Abandonment of Frye *and the Adoption of the Relevancy Standard.* — Under the relevancy approach, a court evaluates evidence based upon "probativeness, materiality, and reliability on the one side and any

---

[100]*Hodo*, 30 Cal. App. 3d at 788, 106 Cal. Rptr. at 553; *Lykus*, 367 Mass. at 203, 327 N.E.2d at 677.

[101]*Hodo*, 30 Cal. App. 3d at 788, 106 Cal. Rptr. at 552-53; *Lykus*, 367 Mass. at 203, 327 N.E.2d at 677-78.

[102]450 N.E.2d 498 (Ind. 1983).

[103]498 F.2d 741 (D.C. Cir. 1974).

[104]*Addison*, 498 F.2d at 745; *Cornett*, 450 N.E.2d at 503.

[105]Imwinkelreid, *A New Era in the Evolution of Scientific Evidence — A Primer on Evaluating the Weight of Scientific Evidence*, 23 WM. & MARY L. REV. 261, 265 (1981) [hereinafter cited as Imwinkelreid, *A New Era*].

[106]*Id.*

[107]Lacey, *supra* note 48, at 265.

tendency to mislead, prejudice, or confuse the jury on the other."[108] In recent years, there has been a trend moving away from the *Frye* standard to the relevancy approach suggested by the Federal Rules of Evidence, thereby providing for greater use of scientific evidence.[109] Three principal arguments have been advanced in support of the movement away from *Frye*:

> 1) Several jurisdictions have abandoned the standard as a rule of decisional law which was not binding upon them.
>
> 2) Others have advanced a statutory construction argument saying that since *Frye* was not codified in the Federal Rules of Evidence it has been impliedly abolished.
>
> 3) Finally, some jurisdictions have invalidated *Frye* on constitutional grounds.[110]

Each of these arguments will be considered separately.

The first argument concerns judicial movement away from non-binding precedent of the Court of Appeals of the District of Columbia in *Frye* to more liberal admission standards through case law. A case representative of this line of reasoning rejecting *Frye* is *People v. Daniels*.[111] In *Daniels*, the court said:

> To require general acceptance would in essence mandate absolute infallibility. Instead, a court should weigh and consider the admissibility . . . in the same manner it makes other decisions related to admissibility of any evidence. If the evidence has substantial probative value and is relevant to the issues and does not endanger the defendant's rights, or prejudice the jury, nor mislead the proper administration of justice, then it should be admitted as any other evidence.[112]

The court abandoned *Frye* as non-binding precedent, which should not be used to exclude scientific evidence where reliability could be otherwise established. A similar argument has resulted in the abandonment of *Frye* in seven other jurisdictions.[113]

---

[108]United States v. Williams, 583 F.2d 1194, 1198 (2d Cir. 1978).

[109]Imwinkelreid, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 100 Mil. L. Rev. 99, 101-107 (1983) [hereinafter cited as Imwinkelreid, *The Standard for Admitting Scientific Evidence*].

[110]Lacey, *supra* note 48, at 265-66.

[111]102 Misc. 2d 540, 422 N.Y.S.2d 832 (N.Y. Sup. Ct. 1979).

[112]*Id.* at 545-46, 422 N.Y.S.2d at 837.

[113]Coppolino v. State, 223 So. 2d 68 (Fla. Dist. Ct. App.), *cert. denied*, 399 U.S. 927 (1970) (where evidence is based solely upon scientific tests and experiments, it is essential that the reliability of the tests and the results thereof shall be recognized and

A second argument for the abandonment of *Frye* is based on statutory construction. Rule 402 of the Federal Rules of Evidence provides that "[all] relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority . . . ."[114] "The argument of statutory construction is straight-forward: since [rule] 402 requires a constitutional, statutory, or court rule basis for excluding evidence that passes muster under [rules] 401 through 403, *Frye* has been impliedly abolished."[115] Because *Frye* has not been codified, it does not meet the requirements of rule 402 and it cannot function to keep out relevant scientific evidence.[116] This approach was adopted in *State v. Williams*.[117] The *Williams* court stated:

> The controlling criteria regarding the admissibility of expert testimony, so long as the proffered expert is qualified and probative value is not substantially outweighed by the factors mentioned in Rule 403, are whether in the sound judgment of the presiding Justice the testimony to be given is relevant and will

---

accepted by scientists or that demonstrations shall have passed from the stage of experimentation and uncertainty to that of reasonable demonstrability); Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982) (the *Frye* rule of counting heads in the scientific community is not an appropriate way to determine the admissibility of a scientific procedure; it is proper for the trial judge to decide whether the procedure or technique has reached a state of verifiable certainty — whether the procedure rests upon the laws of nature); State v. Hall, 297 N.W.2d 80 (Iowa 1980), *cert. denied*, 450 U.S. 927 (1981) (the rationale of *Frye* should apply insofar as it bears upon the reliability of the proffered evidence; general scientific acceptance is not a prerequisite to admission of evidence if the reliability of the evidence is otherwise established); Brown v. Commonwealth, 639 S.W.2d 758 (Ky. 1982), *cert. denied*, 460 U.S. 1037 (1983) (any relevant conclusions supported by a qualified expert witness should be received unless there are other reasons for exclusion); People v. Young, 106 Mich. App. 323, 308 N.W.2d 194 (1981) (strict *Frye* rule does not apply to scientific evidence; in general the distinction is based upon whether or not there was significant difference of opinion among scientists concerning accuracy); State v. Kersting, 50 Or. App. 461, 623 P.2d 1095 (1981), *aff'd*, 292 Or. 350, 638 P.2d 1145 (1982) (the only foundation requirement where the technique has not been accepted in this state is that there be credible evidence on which the trial judge may make the initial determination that the technique is reasonably reliable; if so, the evidence may be admitted and the weight to be given it is for the jury, who may consider evidence as to its reliability); Phillips v. Jackson, 615 P.2d 1228 (Utah 1980) (admissibility is not governed solely by the general acceptance test; an analysis of the admissibility of scientific evidence, while taking into account general scientific acceptance and widespread practical application, must focus in all events on proof of inherent reliability).

[114]FED. R. EVID. 402.

[115]Imwinkelreid, *The Standard for Admitting Scientific Evidence*, *supra* note 109, at 105.

[116]*Id.*

[117]388 A.2d 500 (Me. 1978).

> assist the trier of fact to understand the evidence or determine a fact in issue.[118]

Three other jurisdictions[119] have also used this approach in abandoning *Frye*.

A third argument advanced in abandonment of the *Frye* standard is a constitutional claim based on a criminal defendant's sixth amendment right to due process. In *Chambers v. Mississippi*,[120] the United States Supreme Court recognized a constitutional right to present critical, reliable evidence in a criminal prosecution. The Court held that a state evidentiary rule prohibiting the introduction of critical, reliable evidence by the accused violated due process.[121] Commentators have argued that "[b]roadly construed, [*Chambers*] appears to recognize that the accused in a criminal proceeding has a constitutional right to introduce *any* exculpatory evidence, unless the state can demonstrate that it is so inherently unreliable as to leave the trier of fact no rational basis for evaluating its truth."[122] This approach has also been adopted by state courts in *State v. Dorsey*[123] and *State v. Sims*.[124] Although this argument appears to be limited to a criminal proceeding, the attorney should keep it in mind as potentially persuasive if he seeks to admit a simulation in a criminal trial.

The advantage of the relevancy standard over *Frye* is that relevant evidence, critical to the determination of the truth, is considered by the factfinder. Proponents of the relevancy standard believe that

> unless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead

---

[118]*Id.* at 504.

[119]Barmeyer v. Montana Power Co., 657 P.2d 594 (Mont. 1983) (the general acceptance rule is not in conformity with the spirit of the new rules of evidence); State v. Dorsey, 87 N.M. 323, 532 P.2d 912 (N.M. Ct. App.), *aff'd*, 88 N.M. 184, 539 P.2d 204 (1975) (the New Mexico Rules of Evidence § 20-4-702 provides for admission of scientific, technical, or other specialized knowledge which will assist the trier of fact to determine a fact in issue or understand the evidence through testimony of an expert witness); State v. Williams, 4 Ohio St. 3d 53, 446 N.E.2d 444 (1983) (the rules of evidence establish adequate preconditions for admissibility of expert testimony, and we leave to the discretion of this state's judiciary, on a case-by-case basis, to decide whether the questioned testimony is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue).

[120]410 U.S. 284 (1973).

[121]*Id.* at 302.

[122]Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 151-52 (1974) (emphasis in original).

[123]87 N.M. 323, 532 P.2d 912 (N.M. Ct. App.), *aff'd*, 88 N.M. 184, 539 P.2d 204 (1975) (polygraph results admissible under due process clause when defendant's credibility is a crucial issue).

[124]52 Ohio Misc. 31, 369 N.E.2d 24 (1977) (due process entitles defendant to a new trial during which he may undergo a polygraph examination, the results of which can go to the jury).

> or confuse the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation.[125]

The argument is that even though scientific evidence is admitted at trial, the jury need not accept its validity. Because it is still the jury's function to decide how much weight and credibility to assign such evidence, the conclusion that the evidence will be determinative upon admission does not logically follow.[126] Opponents can still cross-examine the expert who prepared the evidence to demonstrate that the expert is unqualified and to refute the accuracy of the process. Consequently, the factfinder still will make the ultimate reliability/accuracy determination; it remains a judgment call within the province of the finder of fact.

Commentators, however, have recognized three disadvantages of the relevancy standard. First, they are concerned that a trial judge with no scientific background will have difficulty determining the probative value of the evidence. "[I]n the case of scientific evidence the court will generally be forced to accept the probative value of the evidence as what a qualified expert testifies it to be . . . ."[127] Further, there is concern that the adversary discovery rules and the provisions for opponent experts will not ensure adequate cross-examination and refutation because there is not the pool of experts assured under the *Frye* standard.[128] Finally, there is concern that the relevancy approach will not assure the accuracy of the procedure prior to admission.[129]

Despite the valid concerns that these issues raise, they should not bar admission of computer simulations. In weighing the evidence to determine if probative value is outweighed by prejudicial effect, the trial judge can consider each of these concerns. If, in any case, the trial judge is not sufficiently assured that the simulation is reliable, he can exclude such evidence. Further, the trial judge can prevent the cross-examination problem by excluding evidence where the opposing party has not been provided with the program. These concerns, although legitimate, can be addressed by having the trial court weigh them against the value of the evidence.[130] Consequently, they should not bar the ad-

---

[125]United States v. Baller, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975); *see also* United States v. Stifel, 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 431 (1971).

[126]*Baller*, 519 F.2d at 466-67; *Stifel*, 433 F.2d at 441.

[127]Giannelli, *Symposium on Science and Rules of Evidence*, 99 F.R.D. 188, 203 (1983) (quoting Strong, *Questions Affecting the Admissibility of Scientific Evidence*, U. ILL. L.F. 1, 22 (1970)).

[128]Note, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 911 (1982).

[129]*Id.* at 909.

[130]*Id.* at 911.

mission of relevant evidence, but should only be factors considered by the trial judge in determining admissibility.

C. *The Relevancy Standard Under the Federal Rules of Evidence*

Relevant evidence relates to or bears directly upon the point or fact in issue and proves or has a tendency to prove the proposition alleged.[131] There are three issues to be addressed by the litigator seeking to admit computer simulations under the relevancy standard of the Federal Rules of Evidence: authentication requirements, relevancy requirements, and procedural requirements. With regard to the authentication requirements of the Federal Rules of Evidence, rules 901(a) and 901(b)(9) are instructive on the responsibilities of the litigator. Rule 901(a) provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[132] Rule 901(b)(9) illustrates how to meet 901(a) requirements for a process or system.[133] The rule indicates that the process can be authenticated by providing "evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."[134] Here, the litigator will likely want to utilize a test program with known results to indicate that the process used for simulation properly applies generally accepted and recognized principles of physics and mathematics, thereby providing the foundation for computer simulations. Authentication can be achieved through a showing that "the evidence reasonably has the tendency to establish facts of consequence in the action as more probable than they would be without the evidence."[135]

Relevancy requirements are set out in rule 401.[136] " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[137] Courts find that evidence is relevant when it is persuasive or indicative that a fact in controversy did or did not exist, because the conclusion in question may be logically inferred from that evidence; that is, if the probability of the existence of a fact is greater with the evidence, it is

---

[131]BLACK'S LAW DICTIONARY 1160 (5th ed. 1979).

[132]FED. R. EVID. 901(a).

[133]FED. R. EVID. 901(b)(9).

[134]*Id.*

[135]United States v. Brewer, 630 F.2d 795 (10th Cir. 1980); *see also* Finance Co. of Am. v. BankAmerica Corp., 493 F. Supp. 895 (D.C. Md. 1980) (authentication satisfied by evidence supporting finding that the matter in question is what the proponent claims).

[136]FED. R. EVID. 401.

[137]*Id.*

relevant.[138] Competency of evidence finally "depends upon whether it is likely, all things considered, to advance the search for the truth . . . ."[139]

Rule 402 provides for the admission of all relevant evidence absent a constitutional, statutory, or court rule basis for exclusion.[140] Thus, if the attorney can establish that the simulation is relevant, he faces good probability of admission. As several courts have provided, the laws of evidence in the federal courts are "designed to permit the admission of all evidence which is relevant and material to the issues in controversy, unless there is a sound and practical reason for excluding it."[141] Again, the general criterion required for admission under the federal rules is the evidence's "relevance or tendency to prove material fact[s]."[142]

Although the federal rules are decidedly more liberal than the *Frye* standard, not all relevant scientific evidence would be admissible at trial. Rule 403 establishes a balancing test, which the trial judge should employ in making the admissibility decision.[143] The rule states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[144] The court properly excludes evidence when it determines that the "costs of the evidence outweigh its benefits."[145] Rule 403 is designed to keep out evidence with an undue tendency to suggest a decision on an improper basis, such as evidence that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case."[146] Nonetheless, courts have also declared that the rule is to be "sparingly used for the purpose of ruling out otherwise relevant evidence."[147] The general belief is that "it is better to admit

---

[138]*See generally* Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982); Greenwood Ranches, Inc. v. Skie Constr. Co., 629 F.2d 518 (8th Cir. 1980); United States v. Carter, 522 F.2d 666 (D.C. Cir. 1975); United States v. Jones, 520 F. Supp. 842 (E.D. Pa. 1981); Papizzo v. O. Robertson Transp., Ltd., 401 F. Supp. 540 (E.D. Mich. 1975).

[139]United States v. Krulewitch, 145 F.2d 76, 80 (2d Cir. 1944).

[140]FED. R. EVID. 402.

[141]United States v. 1,129.75 Acres of Land, More or Less in Cross and Poinsett Counties, 473 F.2d 996, 999 (8th Cir. 1973); *see also* United States v. 60.14 Acres of Land, More or Less in Warren and McKean Counties, 362 F.2d 660 (3d Cir. 1966).

[142]United States v. Zeiger, 350 F. Supp. 685, 687-88 (D.D.C.), *rev'd on other grounds*, 465 F.2d 1280 (D.C. Cir. 1972).

[143]FED. R. EVID. 403.

[144]*Id.*

[145]United States v. Mangiameli, 668 F.2d 1172, 1176 (10th Cir.), *cert. denied*, 456 U.S. 918 (1982).

[146]Carter v. Hewitt, 617 F.2d 961, 972 (3d Cir. 1980) (quoting J. WEINSTEIN & M. SERGER, WEINSTEIN'S EVIDENCE ¶ 403[3], at 403-15 to 403-17 (1978)).

[147]Ebanks v. Great Lakes Dredge and Dock Co., 688 F.2d 716, 722 (11th Cir. 1982); *see also* United States v. Thevis, 665 F.2d 616, 633 (5th Cir. 1982).

relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation."[148]

The last consideration under a relevancy standard is a determination of the reliability of the evidence. In *United States v. Williams*,[149] in deciding whether admission of spectrographic voice analysis as identification evidence was error, the court weighed the probativeness, reliability, and materiality of the evidence against its tendency to mislead, prejudice, or confuse the jury. The court found that determining the probativeness and materiality of the evidence was of little difficulty in the case and, therefore, proceeded to a discussion of reliability.[150] The court listed five elements the judge should consider in determining the reliability of the proffered evidence: the potential rate of error in the use of the technique,[151] the existence and maintenance of standards governing its use,[152] the care and concern with which the technique was employed,[153] analogy of the technique to others whose results are admissible,[154] and the presence of "failsafe" characteristics of the technique.[155] The litigator's admission arguments should be reasonably focused on these elements to establish a solid foundation for reliability.

A final concern of the litigator seeking to introduce computer simulation evidence is the procedural requirements that accompany such an offer. There will undoubtedly be procedural safeguards to offset any potential prejudice. Four requirements that the litigator will likely face and should consider prior to offering the simulation are:

1) Examination by the trial court of the qualifications of the expert to assure that the technique used is reliable and that his opinion is probative and relevant;[156]

2) Permission to cross-examine as to the expert's qualifications and competence;[157]

3) Instruction to the jury as to how to evaluate scientific evidence;[158] and

---

[148]United States v. Baller, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975).

[149]583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979).

[150]*Id.* at 1198.

[151]*Id.*

[152]*Id.*

[153]*Id.* at 1199.

[154]*Id.*

[155]*Id.*

[156]*See* People v. Daniels, 102 Misc. 2d 540, 553-55, 422 N.Y.S.2d 832, 843 (N.Y. Sup. Ct. 1979).

[157]*Id.*

[158]*Id.* at 555-56, 422 N.Y.S.2d at 844.

4) A requirement that the results, simulations, and all other pertinent data be maintained and exchanged before trial in order for opponents to familiarize themselves with it for possible cross-examination and refutation.[159]

Compliance with these four guidelines will probably be sufficient to avoid exclusion of computer simulation evidence on procedural grounds.

V. Responses to a Hearsay Objection to Introduction of Computer Simulation Evidence

The attorney presenting a computer simulation at trial should anticipate a hearsay objection and should have responsive arguments prepared. One strategy the attorney could use would be to state that the evidence is illustrative of expert testimony and as such, should be admissible as are other forms of demonstrative evidence.[160] Hearsay is defined in rule 801(c) of the Federal Rules of Evidence as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[161] Thus, the litigant in a jurisdiction that has adopted the federal rules could avoid a hearsay problem upon offering a simulation by presenting the simulation as demonstrative rather than substantive evidence. If the simulation is introduced as demonstrative evidence, it is not being offered to prove the "truth of the matter asserted."[162] Consequently, it does not qualify as hearsay under the definition of the federal rules.

An attorney in a jurisdiction that has not adopted the federal rules could be equally successful with this argument provided the jurisdiction's hearsay definition includes only evidence presented to prove the truth of the matter asserted. Indiana provides an example of this argument in a jurisdiction that has not adopted the federal rules. Indiana courts have defined hearsay as an "extrajudicial declaration of another offered to prove the truth of the facts asserted therein, and thus resting on the credibility of a declarant who is not in court and available for cross-examination."[163] Again, demonstrative evidence does not qualify as hearsay because its purpose is not to prove the truth of the facts asserted. It functions to illustrate expert testimony. Thus, the evidence should not be subject to a hearsay objection.

---

[159] *Id.* at 555, 422 N.Y.S.2d at 843.

[160] *See generally* People v. McHugh, 124 Misc. 2d 559, 476 N.Y.S.2d 721 (N.Y. Sup. Ct. 1984).

[161] Fed. R. Evid. 801(c).

[162] *Id.*

[163] Sills v. State, 463 N.E.2d 228, 234 (Ind. 1984); *see also* Roberts v. State, 268 Ind. 348, 353, 375 N.E.2d 215, 219 (1978).

A second argument an attorney could advance in response to a hearsay objection would be that computer simulations are analogous to hypothetical questions, which are acceptable methods of introducing evidence. A hypothetical question is defined as "[a] combination of assumed or proved facts and circumstances, stated in such form as to constitute a coherent and specific situation or state of facts, upon which the opinion of an expert is asked, by way of evidence on a trial."[164] A computer simulation can be viewed as performing a similar function in that observed data is entered into the computer as "a combination of assumed or proved facts" constituting a "coherent and specific situation" upon which the expert, a computer programmed with the appropriate laws of physics and mathematics, is to render an opinion.

Hypothetical questions have "long been recognized as [a] generally approved method of eliciting expert opinion testimony."[165] In fact, several courts have required the use of hypothetical questions when the evidence upon which the expert is to render his opinion is voluminous, complicated, or conflicting in nature.[166] Further, it is well recognized that an expert is not precluded from answering a hypothetical question even if the expert has no personal knowledge of the facts of the case.[167] Resort to this type of questioning is within the attorney's discretion.

As a general rule, the facts assumed in a hypothetical question must be supported by the evidence in the case.[168] In *Chicago, Indianapolis, and Louisville Railroad, Inc. v. Freeman*,[169] the Indiana Court of Appeals said:

> If the question assumes facts which are so clearly exaggerated as to impair the opinion, or are such manifest assumptions as to be misleading, confusing, and outside the evidence or fair inferences to be drawn therefrom, it should be excluded. Where most of the facts assumed in the question were supported by some evidence or by reasonable inferences from the evidence, especially in view of proper instructions as to the weight to be

---

[164]BLACK'S LAW DICTIONARY 669 (5th ed. 1979).

[165]2 WIGMORE, EVIDENCE §§ 672-686 (1979).

[166]O'Brien v. Wallace, 137 Colo. 253, 324 P.2d 1028 (1958); Evans v. DeKalb County Hosp. Auth., 154 Ga. App. 17, 267 S.E.2d 319 (1980); State v. Wangberg, 272 Minn. 204, 136 N.W.2d 853 (1965); Zelenka v. Industrial Comm'n of Ohio, 165 Ohio St. 587, 138 N.E.2d 667 (1956); Young v. Members Life Ins. Co., 624 S.W.2d 821 (Tex. Civ. App. 1981).

[167]Feldstein v. Harrington, 4 Wis. 2d 380, 90 N.W.2d 566 (1958). *See generally* Annot., 82 A.L.R. 1338 (1933).

[168]Donaldson v. Buck, 333 So. 2d 786 (Ala. 1976); Nisbet v. Medaglia, 356 Mass. 580, 254 N.E.2d 782 (1970); Barnett v. State Workmen's Compensation Comm'r, 153 W. Va. 796, 172 S.E.2d 698 (1970).

[169]152 Ind. App. 492, 284 N.E.2d 133 (1972).

> given such testimony, the question is not to be excluded. In addition, a failure to prove a part of the facts embraced in a hypothetical question affects only the reliability of the opinion and the weight to be given the answer.[170]

In the formulation of a computer simulation, the data entered into the computer will generally be known or observed data and, as such, will qualify as evidence of record or as a reasonable inference from such evidence. Thus, it is information that is the proper basis of a hypothetical question. Consequently, it can be considered the proper subject of a simulation to the extent that a computer simulation is, in essence, a modern form of hypothetical question.

VI. Conclusion

Litigation is becoming more sophisticated, and in response, the evidence needed to prove a case is becoming equally sophisticated. Computer simulations have tremendous potential to aid an attorney in proving a case. But such evidence can only be an aid if it is admitted at trial. Thus, whenever an attorney considers using a simulation, he should carefully prepare an admissibility argument. There are three standards for admission that the court may employ: common law principles of demonstrative evidence, the *Frye* standard of general acceptance in the relevant scientific community, and the relevancy/balancing test suggested in rule 403 of the Federal Rules of Evidence.

Under the principles of demonstrative evidence, the attorney should stress that the simulation is offered to illustrate and clarify expert testimony. Further, the attorney should demonstrate the relevance of the evidence; that is, its logical tendency to make a fact in issue more or less probable. Most jurisdictions have readily admitted demonstrative evidence; thus, the likelihood of successful admission of a computer simulation is great.

Under the *Frye* standard, the litigator faces the greatest admissibility challenge. This standard is more conservative than the others, and it imposes the special burden of general acceptance. Admission of simulations is not precluded by this standard, however. If the attorney irrefutably establishes the accuracy of the simulation and the credibility of the expert and further demonstrates that the simulation is based upon theories long recognized under the principles of physics and mathematics, there is great possibility of a favorable admission decision.

Under a relevancy standard, the litigator should address three issues: authentication requirements, relevancy requirements, and procedural re-

---

[170] *Id.* at 497, 284 N.E.2d at 136; *see also* Walters v. Kellam and Foley, 172 Ind. App. 207, 360 N.E.2d 199 (1977); Chicago South Shore & South Bend R.R. v. Brown, 162 Ind. App. 493, 320 N.E.2d 809 (1974).

quirements. Authentication requirements can be met by evidence describing the process or system used in formulating the evidence and by a showing that it produces accurate results. Relevancy requirements will be satisfied generally if the evidence is persuasive or indicative that a fact in controversy did or did not exist, because the conclusion in question may be logically inferred from that evidence. Procedural requirements will primarily be satisfied if the simulation and pertinent data are provided to opposing counsel before trial, thereby ensuring an adequate basis for cross-examination. If the litigator focuses on these requirements, he should have the simulation admitted under the relevancy standard. Because simulations have great potential to aid in the clear presentation of complex information, attorneys with cases that lend themselves to computer simulation evidence should consider this novel technique — they might like the results.

Elaine M. Chaney

Liability for Greenmailers: A Tort is Born

I. Introduction

Corporate takeovers have been widely featured in the news media recently.[1] Such swashbuckling terms as white knights, crown jewels, poison pills, golden parachutes, raiders, and greenmail infuse a touch of romance and high adventure into the seemingly dull and dreary world of corporate finance. This aura of fantasy disguises a very real question concerning the future course of American corporation law: what can be done, if anything ought to be done, about the problem of one corporation buying into another, not for the purpose of investment or acquisition, but solely for the purpose of instilling fear into the target's directors and causing those directors to buy out the raider's[2] equity at a profit?

The recent California Court of Appeals case of *Heckman v. Ahmanson*[3] serves to highlight the nature of this issue. In *Heckman*, an intimation is given that California will no longer tolerate the practice of greenmail. Certain theories of greenmailer liability were discussed and found sufficiently persuasive to justify the grant of a preliminary injunction by a trial court.[4]

This Note will examine state common law for potential theories to hold a greenmailer liable for his harm to the target corporation. The focus will be on the wrong performed by the greenmailer rather than on the potential liability of directors or officers of the target, who may violate fiduciary duties by submitting to greenmail demands.[5] Because

---

[1]*See, e.g.*, Dentzer, *Empty Seats on the Board,* Newsweek, August 5, 1985 at 46 (referring to an effect of Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)); Greenwald, *High Times for T. Boone Pickens*, Time, March 4, 1985 at 52 (cover story); Williams, *It's Time for a Takeover Moratorium*, Fortune, July 22, 1985 at 133.

[2]The use of such terms as "raiders" and "targets" is not intended to have a moral or judgmental implication but is intended for ease in identification of roles in the arena of corporate takeovers.

[3]168 Cal. App. 3d 119, 214 Cal. Rptr. 177 (1985).

[4]The requirements for the grant of an injunction are: (1) a reasonable probability of success on the merits, and (2) the harm to the defendant resulting from the injunction is not greater than the harm to the plaintiff resulting from its denial. *See* Fox v. City of Los Angeles, 22 Cal. 3d 792, 800 n.1, 587 P.2d 663, 667 n.1, 150 Cal. Rptr. 867, 871 n.1 (1978) (Bird, C.J., concurring).

[5]Most commonly, target company directors are the defendants in shareholders' derivative suits alleging a violation of fiduciary duty in repurchasing shares from potential acquirors. *See, e.g.*, Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981); Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690 (2d Cir. 1980). *See generally* Lynch & Steinberg, *The Legitimacy of Defensive Tactics in Tender Offers*, 64 Cornell L. Rev. 901 (1979).

federal abstention is the general rule in this area, this Note will concentrate on available state theories, especially those dealing with fiduciary duties of controlling and dominant shareholders. In this regard, *Heckman v. Ahmanson*[6] will be dissected, as it points to several theories allowing shareholders to recover from the greenmailer. Using *Heckman* as a springboard, other potential theories implying liability for the greenmailer will be analyzed, including particular problems inherent in each.

This topic is important because, absent a common law remedy and in light of federal abstention, greenmail can only become more prevalent. Essentially, it is a practice that perverts one of the strongest arguments for a free market economy—the argument favoring efficiency. The free market has been justified as one in which an "invisible hand" moves resources into their most productive spheres.[7] Greenmail involves the movement (or threat of movement) of large amounts of money into a productive enterprise, not to increase its productivity, but to bleed off its assets. Not only are the target and its shareholders worse off than before, but the assets of the greenmailer are not serving any productive task. And by this coup more funds are attracted to a non-productive use. Money is chasing money and nothing is being produced. If a common law solution can be found, it could halt this non-productive use of scarce resources and allow them to return to their proper roles in a free market economy.

II. Examination of Recovery Under State Common Law

A. Lack of a Federal Remedy

This Note concerns the problem of greenmail. A potential acquiror buys into the target company, generally on the open market. Then follows a tender offer[8] for a certain percentage of outstanding shares—enough for the raider to gain control. The target's board of directors, to rid itself of this offer, which would presumably result in their replacement by the raider, then buys out the equity of the raider at a substantial premium. This corporate repurchase of shares is *not* offered to any shareholders other than the raider.[9]

Greenmail is not presently subject to any direct federal prohibitions. The major federal statute with potential applicability is the Securities Exchange Act of 1934.[10] This Act prohibits "deceptive and manipulative"

---

[6]168 Cal. App. 3d 119, 214 Cal. Rptr. 177 (1985).

[7]A. Smith, The Wealth of Nations, Book IV, Chapter II (Cannan ed. 1776).

[8]A tender offer is an offer to purchase a given number of shares at a certain price. *See generally* Greene & Junewicz, *A Reappraisal of Current Regulation of Mergers and Acquisitions*, 132 U. Pa. L. Rev. 647 (1984).

[9]*Id.* at 706-07.

[10]15 U.S.C. §§ 78a-78jj (1981).

devices in connection with the purchase or sale of any security.[11] However, it and Rule 10b-5[12] have been interpreted by the United States Supreme Court as being designed to insure "protection of investors who are confronted with a tender offer"[13] and as not including "a wide variety of corporate conduct traditionally left to state regulation."[14] Hence, in the absence of a federal statutory prohibition, the common law as interpreted by the states must be the source of any liability for greenmailers. The remainder of this Note will analyze in detail the various theories considered in *Heckman v. Ahmanson*[15] and then expand upon them to suggest additional theories of liability.

B. Heckman v. Ahmanson

In May, 1985, the California Court of Appeals issued its opinion in the case of *Heckman v. Ahmanson*.[16] This is the first case that provides a possibility for shareholders of a target corporation to hold a greenmailer responsible for the return of the greenmail.

In March, 1984, Reliance Insurance Company (Steinberg)[17] purchased over two million shares of Walt Disney Productions (Disney). Interpreting this purchase as a preliminary move for a takeover, Disney announced in May its intent to purchase Arvida Corporation for $200 million in newly issued stock (Arvida transaction). This acquisition would result in an assumption of $190 million of Arvida's debt. This "puff-fish" defense was designed to render Disney less attractive to Steinberg as a potential acquisition and also to dilute his equity by the issue of new stock. Steinberg filed a stockholders' derivative suit in federal court seeking an injunction to halt the Arvida transaction. That effort failed, and on June 6, the Arvida purchase was consumated.[18]

Further purchases of Disney stock continued until on Friday, June 8, Steinberg announced his intention to make a tender offer for 49% of Disney's shares. At that point, Steinberg owned about twelve percent of the shares and was the largest single shareholder in Disney. That

---

[11] *Id.*

[12] 17 C.F.R. § 240.10b-5 (1985). Rule 10b-5 was enacted pursuant to authority granted in Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1981).

[13] Piper v. Chris-Craft Indus., 430 U.S. 1, 35 (1977).

[14] Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478 (1977).

[15] 168 Cal. App. 3d 119, 214 Cal. Rptr. 177 (1985).

[16] *Id.*

[17] The named defendants (other than the Disney directors) were Saul P. Steinberg, Reliance Financial Services Corp., Reliance Group, Inc., Reliance Group Holdings, Inc., Reliance Insurance Co., Reliance Insurance Co. of New York, United Pacific Insurance Co., and United Pacific Life Insurance Company of New York. All are corporate entities dominated by Steinberg. *See* Appellant's Opening Brief at 1, Heckman v. Ahmanson, 168 Cal. App. 3d 119, 214 Cal. Rptr. 177 (1985).

[18] Heckman v. Ahmanson, 168 Cal. App. 3d 119, 124, 214 Cal. Rptr. 177, 180 (1985).

Friday evening, Disney offered to repurchase Steinberg's holdings. By Monday, the deal was in final form: Steinberg agreed to dismiss his individual causes of action in the Arvida litigation and agreed not to make any further purchases of Disney stock. In return, Steinberg's shares were bought for $77 per share, resulting in a profit of $59.9 million for Steinberg. Upon the release of these details, the market price of Disney stock fell below $50 per share.

The plaintiffs (Heckman), Disney shareholders, filed a derivative suit against both the Disney directors and against Steinberg, alleging that Steinberg had utilized his derivative suit and tender offer to obtain a premium price for his stock. Basically, Heckman sought relief for a greenmail scheme against both the greenmailer and against those who submitted to the greenmail. The trial court issued a preliminary injunction requiring Steinberg to care for the $59.9 million profit in accordance with California standards of prudent trusteeship. The $59.9 million became the *res* of a constructive trust in Steinberg's hands pending the outcome of the trial on the merits. Steinberg's appeal of the grant of this injunction resulted in the opinion affirming that grant.[19]

Heckman's theories of recovery, presented in support of his request for an injunction,[20] were primarily based on common law tort theories.[21] His brief presented four sources of a duty of Steinberg to Disney and to Disney's shareholders, represented by Heckman.

Heckman's first theory was that by filing derivative litigation, Steinberg assumed a fiduciary status vis-a-vis the Disney shareholders.[22] A second theory, based on *Jones v. H.F. Ahmanson & Co.*,[23] was that Steinberg was a fiduciary by virtue of his status as a controlling shareholder.[24] A third alternative source of duty was the abandonment of the Arvida litigation by Steinberg. The greenmail was characterized as a payment for abandonment of a remedy sought on behalf of all shareholders; therefore, that payment ought to belong to all shareholders.[25] A final argument was the application of the duties of a volunteer.

---

[19]*Id.* at 124-25, 214 Cal. Rptr. at 180-81.

[20]For the prerequisites of an injunction, see *supra* note 4.

[21]These theories involve the application of volunteer liability and aider-abettor liability to Steinberg. Also the intermediate relief requested was a constructive trust on the greenmail proceeds, based on an equitable theory. *See infra* notes 117-32 and accompanying text.

[22]"Steinberg expressly volunteered to 'fairly and adequately represent the interest of Disney and all other stockholders . . .' in his suit against Disney. With that statement and the filing of his action he became a fiduciary." Respondent's Opening Brief at 10, *Heckman*, 168 Cal. App. 3d 119, 214 Cal. Rptr. 177 (1985) (citations omitted).

[23]1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969).

[24]Respondent's Opening Brief at 11-14, *Heckman*; *see infra* notes 133-63 and accompanying text.

[25]Respondent's Opening Brief at 14-17, *Heckman*; *see infra* notes 117-24 and accompanying text.

Because Steinberg "volunteered" to oppose the acquisition of debt by Disney, he ought to be obligated to oppose the further acquisition of debt reasonably foreseeable as a result of his greenmail operation.[26]

The court of appeals, in discussing whether or not there was a likelihood of success on the merits, consolidated Heckman's four theories into two possibilities—both based on the application of common law tort principles to prove the liability of a greenmailer *qua* greenmailer. Heckman's first possible avenue of success on the merits was that Steinberg may be found liable as an aider and abettor of Disney's directors' breach of fiduciary duty.[27] Relying strongly on the United States Supreme Court decision in *Pepper v. Litton*[28] as adopted by California in *Jones v. H.F. Ahmanson & Co.*,[29] the court first equated the duty of a director with that of "a dominant or controlling stockholder."[30] The court concluded that the business judgment rule[31] would not protect Disney's directors in this case, because they had a possible improper motive, and that consequently Steinberg may be found liable to the shareholders as an aider and abettor of the directors.[32]

The second theory of recovery discussed in the appellate opinion is that of a direct breach of fiduciary duty by Steinberg. Relying strongly on the arguments of Heckman, the court placed the source of the fiduciary duty on the Arvida litigation. "When the Steinberg Group filed suit against Disney to block Disney's purchase of Arvida it assumed a fiduciary duty to the other shareholders with respect to the derivative claims."[33] The court continued, buttressing its fiduciary analysis with the volunteer analogy. "It is significant that both the California and United States Supreme Courts focused on the volunteer status of a plaintiff in a derivative action, a 'volunteer champion' in the words of Justice Jackson."[34]

After analyzing these two possible theories of recovery, the court of appeals concluded that either or both theories could reasonably justify the preliminary injunction.[35] It was, therefore, unnecessary to analyze the duties of a controlling shareholder to a minority shareholder.[36]

---

[26]Respondent's Opening Brief at 17-19, *Heckman*; *see infra* notes 125-30 and accompanying text.

[27]*Heckman*, 168 Cal. App. 3d at 127, 214 Cal. Rptr. at 182.

[28]308 U.S. 295 (1939).

[29]1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969).

[30]*Heckman*, 168 Cal. App. 3d at 126, 214 Cal. Rptr. at 182.

[31]*See infra* notes 68-105 and accompanying text.

[32]*Heckman*, 168 Cal. App. 3d at 128, 214 Cal. Rptr. at 183.

[33]*Id.* at 128, 214 Cal. Rptr. at 183.

[34]*Id.* at 132, 214 Cal. Rptr. at 186.

[35]*Id.* at 133, 214 Cal. Rptr. at 187.

[36]However, in a footnote, the court commented:

The record is inadequate at this time on the question whether the Steinberg

In the opinion the court adopted a decidedly negative stance toward Steinberg. The use of the word, "greenmail," in the first paragraph of the opinion, when it was unmentioned in either the Steinberg or Heckman briefs suggests that this court was going to do something about that practice. This interpretation is reinforced by reference to Steinberg's "ill-gotten gains"[37] and the court's portrait of Disney's shareholders as "citizens, of a town whose volunteer fire department quits fighting the fire and sells its equipment to the arsonist who set it (who obtains the purchase price by setting fire to the building next door)."[38] In the trial court, a similar tone was evident:

> The court then granted the preliminary injunction without any finding of irreparable harm, and without any reference to the merits other than its "gut feeling [that appellees] are going to recover something from somebody. . . . Indeed, when it was pointed out, during oral argument, that respondents' claims are unprecedented, the court merely observed that Reliance's counsel "may become famous for being involved in this case, then."[39]

These courts were both "activist" in that they applied traditional theories to facts in a novel way—without direct precedential authority. Prior to this case, there was no liability for greenmailers. "[W]e have found no case in which a greenmailer was ordered to return his ill-gotten gains, [but] precedent for such a judgment exists in California law."[40]

California was not the only state "ripe" for such a decision. In *Unocal Corp. v. Mesa Petroleum Co.*,[41] the Supreme Court of Delaware reversed a grant of an injunction requested by a greenmailer.[42] This court, instead of treating the greenmailer as a tortfeasor, utilized the business judgment rule[43] to justify a "poison pill"[44] defense by the directors

---

> Group was a controlling shareholder when it sold its stock to Disney. Although it never owned more than about 12 percent of the outstanding Disney stock this is not determinative of control. The question, a factual one, is what amount of influence it could exert on the corporation by reason of its holdings.

Id. at 133 n.7, 214 Cal. Rptr. at 187 n.7.

[37]*Id.* at 126, 214 Cal. Rptr. at 182.

[38]*Id.* at 133, 214 Cal. Rptr. at 187.

[39]Appellant's Opening Brief at 9, *Heckman* (citation omitted).

[40]*Heckman*, 168 Cal. App. 3d at 126, 214 Cal. Rptr. at 182.

[41]493 A.2d 946 (Del. 1985).

[42]*Id.* at 958-59.

[43]*See infra* notes 68-105 and accompanying text.

[44]The "poison pill" defense involves the creation of a special preferred stock (or provides for a conversion option to the preferred stock) for all shareholders who do not tender to a raider. If the raider subsequently acquires a controlling interest, the preferred stock becomes redeemable at a specified price and at a high priority. Greene & Junewicz, *supra* note 8, at 704-05.

of Unocal.[45] Both the Delaware and the California courts were willing to extend the application of certain common law doctrines to discourage or punish raiders' activities.

C. Potential State Remedies

Prior to a discussion of greenmail liability, it must be emphasized that although the corporate directors or officers who authorize the payment of greenmail are fiduciaries and, therefore, are most often the defendants in suits for recovery by target shareholders,[46] they may also be viewed as victims of the greenmailers. In an analogous situation, that of blackmail, it would be considered absurd to suggest that the payer of blackmail is the wrongdoer. Likewise, in a greenmail situation, a remedy ought to be available against the true wrongdoer—the greenmailer.

Certain desiderata characterize the "ideal" remedy. The remedy must be able to distinguish between a legitimate corporate repurchase of stock from a troublesome shareholder and a true greenmail scheme.[47] In the first situation, the impetus for the repurchase most often originates with the directors and is not sought by the shareholder, though he may accept the offer. Although greenmail also may often appear to originate with the directors of the target, it rarely will surprise the greenmailer, who often has a history of similar deals in his past. Analysis of an individual transaction will not serve to distinguish these two situations because of the vagueness of the distinction. Instead, a continuum must be imagined, with the poles as the archetypes just described. The closer a corporate selective repurchase approaches the greenmail scenario, the less protection ought to be offered by the business judgment rule. Conversely, the more the transaction is characterized by "legitimate" corporate interest, the more deference ought to be given to the directors.

The "ideal" remedy against greenmailers would also be one that would not needlessly require the "sacrifice" of innocent parties. The procedural stance of *Heckman* was a shareholders' suit against a greenmailer and against the directors of the target.[48] If a greenmail situation victimizes the directors of a corporation as well as the shareholders, it is evident that requiring the dual accountability of both directors and

---

[45]493 A.2d at 955-57.

[46]*See supra* note 5.

[47]*Compare* Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (1964) (legitimate business purpose in stock repurchase to avoid a takeover) *with* Bennett v. Propp, 41 Del. 14, 187 A.2d 405 (1962) (wrongful repurchase to prevent takeover by outsider). *See generally* Comment, *Buying Out Insurgent Shareholders with Corporate Funds*, 70 YALE L. J. 309 (1960).

[48]*See supra* note 19 and accompanying text.

greenmailer is often unfair to the directors. An ideal remedy will hold the greenmailer directly responsible for the "tort" of greenmail.

The major obstacle to greenmailer liability is the lack of duty of the greenmailer to the target corporation or to its shareholders. *Heckman* presented some hints as to sources for such a duty. Such analysis will now be expounded.

D. Aiding and Abetting

The *Heckman* court began its analysis with a discussion of the likelihood that Steinberg would be found liable to the shareholders as an aider and abettor of the directors' breach of fiduciary duties in disgorging greenmail.[49] Although Heckman's brief does not contain an argument for liability of aiders and abettors, he evidently did make that argument in the trial court. Steinberg's brief opposes that theory as having no precedent[50] and as lacking the necessary predicate, i.e., "that the purchase of [Steinberg's] Disney stock by Disney was motivated solely by the directors' desire to perpetuate their own control, rather than by a good faith belief that the corporate interest was served thereby[,]"[51] and cites *Cheff v. Mathes*[52] in support of this defense. Here, Steinberg was attempting to assert the traditional Delaware business judgment rule[53] as a shield for Disney that would, in turn, protect him from liability as an aider and abettor. The appellate court, disagreeing with this version of the rule, instead applied the following version:

> Once it is shown a director received a personal benefit from the transaction, which appears to be the case here, the burden shifts to the director to demonstrate not only the transaction was entered in good faith, but also to show its inherent fairness from the viewpoint of the corporation and those interested therein.[54]

Although there was no evidence in the trial court that Disney's directors were improperly motivated, the court of appeals disclaimed any need

---

[49]168 Cal. App. 3d at 126, 214 Cal. Rptr. at 182.

[50]"No California court has recognized a cause of action against a selling shareholder for aiding and abetting a breach of duty on the part of the directors who initiate the purchase." Appellant's Opening Brief at 25.

[51]*Id.*

[52]41 Del. Ch. 494, 199 A.2d 548 (1964). This case involved a corporate repurchase of stock from a third party interested in gaining control and changing the sales procedures and compensation programs of the target company. The Delaware Supreme Court found a legitimate business purpose in maintaining those corporate policies. Thus, the repurchase was justified. *Id.*

[53]*See infra* notes 68-105 and accompanying text.

[54]*Heckman*, 168 Cal. App. 3d at 128, 214 Cal. Rptr. at 183.

for a "smoking gun": "The acts of the Disney directors—and particularly their timing—are difficult to understand except as defensive strategies against a hostile takeover."[55] Directors merely undertaking defensive maneuvers is apparently enough to cast the burden on them to justify their acts as fair to their shareholders.[56]

The basis of the aiding and abetting liability pertinent to a greenmail situation is tort law. The tort of greenmail is one in which the wronged party is the corporation. The *Restatement (Second) of Torts* section 876(b) provides a general statement of liability for aiders and abettors:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> . . . .
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. . . .[57]

The application of this model to a greenmail case may appear somewhat questionable when considering the fact that all of the illustrations in the *Restatement* concern physical harms. However, there are many cases utilizing this section that do not limit the application to physical harms. Among those are a number of common law interpretations of violations of section 10(b) of the Securities Exchange Act of 1934[58] and of Rule 10b-5[59] enacted pursuant to that Act. Although these cases deal with the interpretation of a statute, they do point out the parameters of an action involving no physical harm based upon *Restatement* section 876(b).

A good example of the use of section 876(b) in this context by the courts is *Brennan v. Midwestern Life Insurance Co.*[60] There, the defendant insurance company's stock was sold to the public by a brokerage firm. The brokerage firm used the proceeds for speculation, eventually resulting in the broker's bankruptcy. The buyers of the stock had questioned the insurance company about their stock certificates, which they had never received. The breach of duty alleged against the defendant insurance company was its failure to inform either the Indiana Securities Com-

---

[55] *Id.*

[56] If the Delaware rule were utilized, the greenmailer, as well as the directors, would be beyond the reach of the target's shareholders. *See infra* notes 68-105 and accompanying text.

[57] RESTATEMENT (SECOND) OF TORTS § 876 (1977).

[58] 15 U.S.C. §§ 78a-78jj (1981).

[59] 17 C.F.R. § 240-10b-5 (1985).

[60] 259 F. Supp. 673 (N.D. Ind. 1966) (motion to dismiss denied), 286 F. Supp. 703 (N.D. Ind. 1968) (on merits).

mission or the Securities Exchange Commission, thereby aiding and abetting the broker's violations of the Securities Act.[61] The *Restatement (Second) of Torts* section 876(b)[62] was used to define the defendant's liability.[63] Responding to the defendant's motion to dismiss for failure to state a valid claim, the federal district court replied:

> A basic philosophy of the Securities Exchange Act of 1934 is disclosure . . . . The investor's protection is the paramount consideration . . . . The effect on an investor of an issuer corporation's failure to disclose improper activities of a brokerage firm . . . may be just as dangerous and equally as damaging as a failure by the issuer to disclose information of its own improper activities . . . . The loss to the investor may well be the same. . . . [A] statute with a broad and remedial purpose such as the Securities Exchange Act of 1934 should not easily be rendered impotent to deal with new and unique situations within the scope of the evils intended to be eliminated.[64]

Although the act of aiding and abetting in *Brennan* appears to have been an act of omission, the court found sufficient affirmative acts to hold the insurance company liable by the standards of section 876(b).[65]

Perhaps the most succinct encapsulation of the requirements for aider-abettor liability under section 876(b) was that of the Second Circuit in *Landy v. Federal Deposit Insurance Corp.*[66] "Three elements are thus required for liability: (1) that an independent wrong exists; (2) that the aider or abettor know of that wrong's existence; and (3) that substantial assistance be given in effecting that wrong."[67]

To hold a greenmailer liable for aiding and abetting, then, would require proof of the directors' breach of duty as a prerequisite to the greenmailer's liability. Of the three *Landy* elements, the most crucial is the first: the plaintiff must allege and prove that a wrong exists, independent of the acts of the greenmailer. The only possible wrong to the corporation, not involving the raider, is the payment of the greenmail by the corporate fiduciary. Because a greenmailer would not be liable absent proof of this breach, the greenmailers would use any defenses available to the directors to shield their decision to pay greenmail.

The traditional bulwark of directors defending their past decisions against shareholders has been the business judgment rule. This rule

---

[61] *Id.* at 675.

[62] RESTATEMENT (SECOND) OF TORTS § 876 (1977).

[63] 259 F. Supp. at 680.

[64] *Id.*

[65] 286 F. Supp. 702, 708-28 (N.D. Ind. 1968), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

[66] 486 F.2d 139 (3d Cir. 1973).

[67] *Id.* at 162-63.

allows a presumption that directors acted properly when making entrepreneurial decisions for a corporation.[68] This rule is closely intertwined with the concept of fiduciary duties that directors owe their corporation. The base facts that give rise to the presumption of good business judgment are that the obligations of due care and corporate loyalty have been met by the directors.[69] A third element often added to these basic prerequisites is that the director have had no personal interest in the questioned transaction.[70] This requirement, often phrased as one for a rational business purpose,[71] is probably best regarded as a sub-category of the duty of loyalty.

From these basic elements of the business judgment rule, loyalty to corporation, duty of care, and rational business purpose, some policies favoring the rule may be discerned. The most prevalent justification for the rule is the traditional reluctance of courts to substitute their judgment for that of corporate directors.[72] Not only is it unfair to judge from a point where the wisdom or folly of a risk is evident,[73] but also the judgment of directors is what the shareholders chose through the operation of corporate democracy.[74] In hindsight, almost any unsuccessful entrepreneurial decision may be criticized as wasteful, but many "crazy"

---

[68]The business judgment rule has been defined as follows:

> Recognizing that, consistent with the business corporation's profit orientation, business judgment inevitably involves risk evaluation and assumption, and recognizing that the office of corporate director, as such, does not require full-time commitment to the affairs of the enterprise, the corporate director frequently makes important decisions which may eventually prove to be erroneous. A director exercising his good faith judgment may be protected from liability to his corporation under the Business Judgment Rule. While not part of the statutory framework, this legal concept is well established in the case law of most jurisdictions. When viewing the decisions of directors acting in the exercise of free and independent judgment, courts have been extremely reluctant to find that they acted negligently. Recognizing that business decisions may seem unrealistically simple when viewed with hindsight, and expressing reluctance to substitute their judgment for that of directors, courts have generally refrained from questioning the wisdom of board decisions.

Committee on Corporate Laws, Section of Corporation, Banking and Business Law, American Bar Ass'n, *Corporate Director's Guidebook*, 33 Bus. Law. 1591, 1603-04 (1978). *See generally* Block & Prussin, *The Business Judgment Rule and Shareholder Derivative Actions: Viva Zapata*? 37 Bus. Law. 27, 33-34 (1981); Manning, *The Business Judgment Rule in Overview*, 45 Ohio St. L. J. 615, 617-18 (1984).

[69]Whittaker Corp. v. Edgar, 535 F. Supp. 993, 950 (N.D. Ill. 1982).

[70]*Id.*

[71]*See, e.g.*, Manning, *supra* note 68, at 621-22.

[72]*Id.* at 622.

[73]Another policy reason subsumed in courts' reluctance to pass liability judgments on business decisions is the desire to have "good" businessmen undertake directorial duties. Block & Prussin, *supra* note 68, at 32.

[74]*See generally*, Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 Calif. L. Rev. 1 (1969).

ideas have succeeded. The Edsels and DeLoreans of the world are but the flip side of the hula hoops and frisbies. The policy may be that courts do not want to discourage the risk-taking function of directors by over-emphasis on the downside risk by imposing personal liability.

A final policy in favor of the business judgment rule, as it has developed, is the policy in favor of predictability.[75] A frank recognition by potential litigants of the burdens they must overcome to triumph against directors discourages a great deal of harassing and duplicative litigation.[76]

Interlaced with the business judgment rule is the intrinsic fairness test, applied when the initial presumption of the business judgment rule "bursts." This test requires the directors to come forward with affirmative proof of the intrinsic fairness of the questioned transaction.[77]

What the plaintiff shareholder must do to overcome the initial presumption and therefore trigger the intrinsic fairness test varies by jurisdiction. Generally, there are two rules with various intermediate positions. For ease in identification, the two prototype positions will be called the Delaware and the California rules.

The Delaware rule allows the presumption of good business judgment to "burst" and requires directors to prove the intrinsic fairness of their decision only when the plaintiff can demonstrate that the director's decision was "solely and primarily" caused by an interest conflicting with that of the corporation.[78] A typical case is *Johnson v. Trueblood*,[79] in which the Third Circuit interpreted Delaware law as requiring "at a minimum the plaintiff must make a showing that the sole or primary motive of the defendant [director] was to retain control. If he makes a showing sufficient to survive a directed verdict, the burden then shifts to the defendant to show . . . a valid corporate business prupose."[80] Not only must the Delaware plaintiff show proof of a forbidden purpose, but he also risks a directed verdict if he does not meet this heavy burden.

---

[75]Of course, any legal rule that favors one party with strong presumptions approaches a high degree of predictability. The unpredicability of the business judgment rule is due to courts' present tendency to modify it.

[76]Traditionally, a plaintiff must overcome the presumption of directorial good faith by demonstrating a wrongful "sole or primary" motive. Directors could easily resuscitate the presumption by a *post hoc* "rational business purpose." *See generally*, Note, *The Misapplication of the Business Judgment Rule in Contests for Corporate Control*, 76 Nw. U.L. Rev. 980, (1982).

[77]*See* Maldonado v. Flynn, 413 A.2d 1251, 1255-56 (Del. Ch. 1980).

[78]Johnson v. Trueblood, 629 F.2d 287, 293 (3rd Cir. 1980); *see also* Arsht, *Fiduciary Responsibilities of Directors, Officers and Key Employees*, 4 Del. J. Corp. L. 652, 663 (1979).

[79]629 F.2d 287 (3d Cir. 1980).

[80]*Id.* at 293. This standard was recently reaffirmed in Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

The California rule shows more willingness to shift the burden to the directors to justify their decision. In *Klaus v. Hi-Shear Corp.*,[81] the Ninth Circuit, interpreting California law, found the presumption of good business judgment "burst" with a showing of a *possible* conflict of interest.[82] In *Klaus*, the test was one of "balancing . . . the good to the corporation against the disproportionate advantage to the majority shareholders and incumbent management."[83] This test requires the directors, in a suit alleging a possible conflict of interest, to demonstrate a "compelling business purpose" in order to meet the good faith requirement of the business judgment rule.[84] The clearest definition of the California rule is in *Jones v. H.F. Ahmanson & Co.*,[85] where the California Supreme Court stated: "the comprehensive rule of good faith and inherent fairness to the minority in any transaction where control of the corporation is material properly governs controlling shareholders in this state."[86] In a case involving a potential change of corporate control, California will not allow directors the shield of the business judgment rule unless they first show the inherent fairness of the questioned transaction. Delaware would first require a showing of "sole or primary" purpose in conflict with that of the corporation before triggering such an obligation.

The primary arena for interpretation of the proper use of the business judgment rule is in corporate takeovers.[87] By the very nature of the challenge to the directors' authority, there is a conflict of interest. Judge Cudahy, concurring in part and dissenting in part in *Panter v. Marshall Field & Co.*,[88] pointed out the nature of this conflict:

> Directors . . . are, at the very least, "interested" in their own positions of power, prestige and prominence . . . . They are "interested" in defending against outside attack the management which they have, in fact, installed or maintained . . . . And

---

[81] 528 F.2d 225 (9th Cir. 1975).

[82] *Id.* at 234.

[83] *Id.*

[84] *Id.*

[85] 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969); *see also* Note, Jones v. Ahmanson: *The Fiduciary Obligations of Majority Shareholders*, 70 COLUM. L. REV. 1079 (1970).

[86] 1 Cal. 3d at 112, 460 P.2d at 474, 81 Cal. Rptr. at 602.

[87] *See, e.g.*, Block & Prussin, *supra* note 70; Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Gelfond & Sebastian, *Reevaluating the Duties of Target Management in a Hostile Tender Offer*, 60 B.U.L. REV. 403 (1980); Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101 (1979); Lynch & Steinberg, *supra* note 5; Manning, *supra* note 68; Nathan & Sobel, *Corporate Stock Repurchases in the Context of Unsolicited Takeover Bids*, 35 BUS. LAW. 1545 (1980).

[88] 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

> they are "interested" in maintaining the public reputation of their own leadership and stewardship against the claims of "raiders" who say that they can do better.[89]

From such characterizations of the "interested"-ness of all directors, even those characterized as "independent," has developed the "management entrenchment"[90] model of directional behavior. This model looks at the directors' behavior during a potential takeover situation as primarily motivated by a concern to retain their positions of power and influence. This model becomes more persuasive when account is taken of the type of defensive tactics presently available to the directors of a target and the effects of those defenses upon the shareholders of the target.

The interpretations of the business judgment rule by California and Delaware appear to differ in their applications of the rule to takeover situations. However, a series of Delaware cases shows a definite trend toward the California position. The Delaware case of *Cheff v. Mathes*[91] demonstrates the traditional operation of the Delaware business judgment rule in a greenmail context. In *Cheff*, the basis of the stockholders' complaint was the directors' repurchase of stock from a potential acquirer. This repurchase was ostensibly for the purpose of instituting a stock option plan, which never took place. The trial court found that the true purpose behind the selective repurchase was fear of a hostile takeover, but the Delaware Supreme Court found that the directors were justified in fearing such a takeover and "[i]n any event, this question was a matter of business judgment, which furnishes no justification for holding the directors personally responsible in this case."[92] To reach this conclusion, the court upheld the lower court's shifting of the burden to the directors to justify their decision, but held that burden was satisfied "by showing good faith and reasonable investigation . . . ."[93]

Two recent decisions of the Delaware Supreme Court appear to show a shift in emphasis from concern for the target directors toward a concern for the target shareholders. In *Weinberger v. UOP, Inc.*,[94] a majority of a subsidiary's stock was held by a parent corporation which, by purchasing the remaining shares, merged the subsidiary into the parent.[95] Certain shareholders, the plaintiffs, alleged that insufficient

---

[89] *Id.* at 300-01 (Cudahy, J., concurring in part and dissenting in part).

[90] This term, management entrenchment, was developed in Note, *Greenmail: Targeted Stock Repurchases and the Management—Entrenchment Hypothesis*, 98 HARV. L. REV. 1045 (1985).

[91] 41 Del. Ch. 494, 199 A.2d 548 (1964).

[92] *Id.* at 508, 199 A.2d at 556-57.

[93] *Id.* at 506, 199 A.2d at 555.

[94] 457 A.2d 701 (Del. 1983).

[95] For background information on so-called "freezeout mergers," see generally Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354 (1978).

information was given to the minority who sold their shares to the majority.[96] The court, in a reverse analysis of the business judgment rule, agreed with the trial court that the ultimate burden of production is on the majority shareholder (the directors) to show intrinsic fairness. But prior to that obligation, the challengers must show "some basis for invoking the fairness obligation."[97] So far the traditional Delaware rule held—to bypass the business judgment rule defense, the plaintiff must show "some basis," traditionally, a demonstration of a forbidden sole or primary purpose. But the court continued with a precondition to that requirement: "[T]he burden clearly remains on those relying on the vote [of the shareholders] to show that they completely disclosed all material facts relevant to the transaction."[98] Thus, in *Weinberger*, the Delaware Supreme Court, by backing up a step in its analysis, essentially reached the position of the California rule, that the burden is on the corporate directors, when faced with a conflict of interest, to show their decision was fair to the corporation. The difference is one of form. Instead of "bursting" the presumption as in California, Delaware requires particular pre-conditions of fairness and disclosure to be demonstrated prior to the application of the rule.

This pre-test for the invocation of the Delaware rule was continued and refined in *Smith v. Van Gorkom*.[99] This case involved a shareholder's suit against corporate directors for approving a merger with another corporation at an insufficient price. This approval took place after a two hour meeting, opened by a presentation by the target's chairman.[100] Evidence at the trial showed that the chairman had approached the acquirer and had, in fact, suggested the price. The Delaware Supreme Court, reversing the Court of Chancery, found "no protection for directors who have made an unintelligent or unadvised judgment."[101] *Smith* demonstrates the willingness of Delaware to back away from blind adherence to a presumption of "good business judgment" and look into the facts to discern whether the requisites of the business judgment rule have actually been met. Instead of relying on the plaintiffs to show improper motives, Delaware will place the burden on the directors to show that their decisions were informed.[102] This approach does not invalidate the concept of gross negligence as the basis of directorial liability. Rather it defines lack of *informed* business judgment as gross negligence. "We

---

[96]457 A.2d at 703.

[97]*Id.*

[98]*Id.*

[99]488 A.2d 858 (Del. 1985); *see also* Spiegel, *The Liability of Corporate Officers*, 71 A.B.A. J. 48 (1985).

[100]488 A.2d at 869. The facts also show that the chairman was preparing to retire.

[101]*Id.* at 872.

[102]*Id.* at 873.

think the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one."[103]

Smith v. Van Gorkom puts the Delaware rule into near congruence with the California rule.[104] In either state, directors can no longer blindly rely on the business judgment rule to shield any decision upon which can be placed a *post hoc* "rational business purpose." This interpretation is especially true in contests for corporate control. Therefore it becomes much easier for a plaintiff in a derivative suit to hold a greenmailer liable for his gains under a theory of aiding and abetting, for the plaintiff is able to prove the first element of his case—that is, that the greenmailer assisted the director to commit an independent wrong.

However, the use of section 876(b) has two distinctly unsatisfactory by-products. First, the directors of the corporation, arguably acting for the benefit of the corporation,[105] must serve as the principal whose breach of duty was aided and abetted.[106] Even if the shareholders of the target sought recompense only from the greenmailer, and assuming that contribution[107] from the directors as co-tortfeasors of the greenmailer were prevented, some onus must still attach itself to the directors. Thus, section 876(b) provides only for secondary liability, one which requires a showing of a primary breach of duty on the part of the shareholders.

Secondly, the use of such a secondary liability may allow the use by the greenmailer of defenses available to directors, such as Steinberg's attempt to shield himself by invoking the business judgment rule to excuse the Disney directors' payment of greenmail.[108] This tactic was unsuccessful in *Heckman* because the California rule shifts the burden

---

[103] *Id.*

[104] However *Smith* does not adopt the California rule. It reaches nearly the same position, but further court decisions are needed to ascertain the extent to which Delaware will require a showing of "informed" business judgment. The facts in *Smith* are so extreme that the decision may be reactive to those facts. Only when placed side by side with *Weinberger* can a pattern be discerned.

[105] The issue is one of motive, whether the directors acted in the best interest of the corporation or whether they acted selfishly to preserve their positions of authority. *See supra* notes 47-48 and accompanying text.

[106] All three subsections of § 876 of the RESTATEMENT provide for aider-abettor liability. RESTATEMENT (SECOND) OF TORTS § 876 (1977).

[107] For an excellent treatment of the problems inherent in contribution, see Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, in Pari Delicto, Indemnification and Contribution*, 120 U. PA. L. REV. 597 (1972).

[108] "The Steinberg Group contends there was no evidence presented to the trial court that the repurchase agreement was motivated by the Disney directors' desire to perpetuate their own control instead of a good faith belief the corporate interest would be served thereby." Heckman v. Ahmanson, 168 Cal. App. 3d 119, 127, 214 Cal. Rptr. 177, 183 (citations omitted).

to the directors to show inherent fairness in situations involving potential changes of corporate control.[109] However, more traditional jurisdictions may allow the raider to use the business judgment rule to shift the burden to the shareholders to prove that the payment of the greenmail was unfair to the corporation or was caused by the sole and primary purpose of the directors to save their positions of influence.[110]

Also, section 876 of the *Restatement (Second) of Torts* does provide for liability for one who "does a tortious act in concert with the other or pursuant to a common design" resulting in harm to a third person.[111] The use of this section relieves a plaintiff harmed by greenmail from showing the second *Landy*[112] element, "that the aider or abettor *know* of that wrong's existence,"[113] but the issue of directorial culpability still exists. The same objections exist as when using section 876(b).

However, section 876(c) gives a tantalizing glimpse at a third possibility, hinting at a direct liability for the greenmailer:

> . . . one is subject to liability if he
>
> . . .
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[114]

The *Restatement's* comment e to clause (c) excludes any need for the greenmailer to know that greenmail is a wrong to the corporation:

> e. When one personally participates in causing a particular result in accordance with an agreement with another, he is responsible for the result of the united effort if his act, considered by itself, constitutes a breach of duty and is a substantial factor in causing the result, *irrespective of his knowledge that his act or the act of the other is tortious.*[115]

There is no doubt that this comment provides for the aider-abettor's total liability for the joint wrong, but it is still a *joint* wrong, and whether or not the directors are sued or held accountable, some culpability must attach to them. The possibility of attributing a duty to the greenmailer via aider-abettor liability is one that does not meet the goal that an innocent director not be sacrificed to hold a greenmailer liable.

---

[109] *See supra* notes 81-86 and accompanying text.

[110] *See generally* Note, *supra* note 76.

[111] RESTATEMENT (SECOND) OF TORTS § 876(a) (1977).

[112] *See supra* notes 66-67 and accompanying text.

[113] 486 F.2d at 162; *see supra* notes 66-67 and accompanying text.

[114] RESTATEMENT (SECOND) OF TORTS § 876(c) (1977).

[115] *Id.*, comment e.

Furthermore, section 876(c) requires that the aider and abettor's conduct itself constitute a breath of duty to the third person; hence, a greater showing with regard to the greenmailer's acts must be made under subsection (c) than under subsection (b).

E. Direct Liability—A Search for an Independent Duty

If it is conceded that greenmail is a wrong not only to the target corporation but also to the shareholders, the directors, and the officers of the target, then the missing element needed to render greenmail a business tort is a duty of the greenmailer to the corporation, to its management, or to his fellow shareholders.

Regarding possible sources of that duty, the *Heckman* court concluded that Steinberg's potential liability could reasonably be grounded on his breach of a direct fiduciary duty owed to Disney's shareholders.[116] This duty arose when Steinberg filed the Arvida litigation as the representative party in a shareholders' derivative suit.[117] The United States Supreme Court, in *Young v. Higbee Co.*,[118] found a breach of fiduciary duty in two plaintiffs' sale of their stock to a corporation against which they had filed a derivative suit. The sale occurred when the plaintiffs were in the appellate process contesting an adverse decision below. The Supreme Court found liability in their acts as a violation of the duties of a derivative suit plaintiff to those whom he represents.[119] Similarly, in *Heckman*, the plaintiff argued that the liability of Steinberg to Disney's shareholders arose from his representation of Disney shareholders.[120] In *Young*, the premium price for the plaintiffs' shares was found to be the property of all the represented shareholders who were deprived of the right to prosecute "their" appeal.[121] It was their interest that was sold by the derivative plaintiffs. In *Heckman*, the profits of Steinberg's sale of stock to Disney ought to belong to those whom Steinberg represented—and abandoned—in the Arvida litigation.[122]

Steinberg's attempt to distinguish *Young* from the facts in dispute was answered by the *Heckman* court:

> We do not believe the result in *Young* stemmed from its unusual facts. Rather, it was consistent with a long-established rule of

---

[116]168 Cal. App. 3d at 134, 214 Cal. Rptr. at 187.

[117]*Id.* at 128-29, 214 Cal. Rptr. at 183-84.

[118]324 U.S. 204 (1945).

[119]*Id.* at 213-14.

[120]Respondent's Opening Brief at 16, *Heckman*.

[121]324 U.S. at 213.

[122]Steinberg's attempted distinction of *Young* relied on the Young plaintiffs' leaving their represented parties without a remedy. Here the suit was still intact and needed only another representative to prosecute the suit. Appellant's Opening Brief at 17-18, *Heckman*.

> equity, the rule of individual loyalty, which prevents a fiduciary from profiting at the expense of his beneficiary.[123]

The court's reasoning that Steinberg had assumed a fiduciary duty was reinforced by a volunteer argument offered by the *Heckman* plaintiffs.[124] Using a California tort case,[125] Heckman argued that in the Arvida litigation, Steinberg volunteered "to attempt to prevent Disney from acquiring the large debt" concomitant to that purchase.[126] The duties of a volunteer and the extent of those duties are self-imposed; here the duty was to prevent Disney from accumulating more debt. By selling his stock at a premium, which he knew or should have known would be financed by further borrowing, Steinberg brought about the precise evil he had "volunteered" to oppose. And, noted Heckman, this breach of duty was self-serving.[127]

Steinberg's opposition to the volunteer theory first noted its novelty and untried character:

> [T]he "Good Samaritan" rule has nothing to do with this action; it is purely a tort concept, requiring one who aids a personal injury victim to act with due care. It is not applicable to commercial business transactions, and respondents have not cited a single case which extends the principle beyond personal injury tort cases.[128]

Steinberg then disparaged the theory even as an analogy because the Arvida litigation proposed to dissuade Disney only from incurring the Arvida debt, not to oppose all debt Disney ever would acquire in any future transaction.[129] The Arvida litigation was specific, not general.

The use of a derivative suit as the source of a duty for a greenmailer is very persuasively presented by the *Heckman* court. This approach has the advantage of providing a direct source of liability, as opposed to the secondary liability offered by aider-abettor theory.[130] The greenmailer "volunteered" to serve the interests of the target's shareholders and cannot effectively deny that assumption of duty, especially when the filing of a derivative suit is one of the factors pressuring the directors to offer greenmail. This causal chain in *Heckman* is very short and very apparent.

---

[123]168 Cal. App. 3d at 132-33, 214 Cal. Rptr. at 186.

[124]*Id.* at 133, 214 Cal. Rptr. at 186.

[125]Williams v. State, 34 Cal. 3d 18, 644 P.2d 137, 192 Cal. Rptr. 233 (1983) (involving an auto accident in which a policeman voluntarily aided an injured party).

[126]Respondent's Opening Brief at 17-18, *Heckman*.

[127]*Id.* at 19.

[128]Appellants' Reply Brief at 20, *Heckman* (citations omitted).

[129]*Id.* at 21.

[130]*See supra* notes 106-11 and accompanying text.

If this source of duty is ultimately used to attach liability to Steinberg (and the likelihood is strong), its weakness becomes evident: few raiders will undertake derivative suits. As in *Heckman*, the derivative action is most often not the heart of the raider's threat, but merely an additional source of directorial anxiety.[131] A more certain and less easily evaded source of duty is needed.

A possible alternate source of direct liability for a greenmailer stems from the attribution of fiduciary duties to a controlling shareholder. There are two theories regarding the source of a duty for the control-holder. In the first theory, the analogy of a trust is used: because the control-holder has custody of the assets of the non-controlling shareholders, principles of equity require him to care for those assets as a trustee, thus creating a fiduciary relationship.[132] Another theoretical source is derivative in nature: as officers and directors are bound by fiduciary obligations, the control-holder who operates through them ought to be similarly constrained.[133]

The fiduciary duties of a control-holder are further confused by the lack of a consensus as to the definition of "control." The Delaware Court of Chancery defined control by its results. " 'Control' and 'domination' . . . imply . . . a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling."[134] Even without any direct participation in corporate governance by a controlling shareholder, "it may be inferred that management consults such an outside [shareholder]."[135]

In *Perlman v. Feldmann*,[136] the Second Circuit Court of Appeals found that the sale of thirty-seven percent of a steel corporation by the largest shareholder, who was also president and chairman of the board of directors, to one of the company's customers at a premium price was a breach of duty to the steel corporation's other shareholders.[137]

---

[131]"The goal is to so preoccupy management that it will buy out the investor's shares in order not to be diverted from running the company's business." Greene & Junewicz, *supra* note 8, at 706.

[132]*See, e.g.*, Pepper v. Litton, 308 U.S. 295, 306 (1939) (refers to powers of "dominant or controlling stockholders[s]" as "powers in trust"). *See generally* Bayne, *A Philosophy of Corporate Control*, 112 U. PA. L. REV. 22 (1963).

[133]Zahn v. Transamerica Corp., 162 F.2d 36, 46 (3d Cir. 1947) (refers to "puppet-puppeteer relationship").

[134]Kaplan v. Centex Corp., 284 A.2d 119, 123 (Del. Ch. 1971).

[135]Gottesman v. General Motors Corp., 279 F. Supp. 361, 368 (S.D.N.Y. 1967).

[136]219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955).

[137]Although there is some hint in the *Perlman* opinion that liability was imposed for depriving the corporation of an opportunity rather than the securing of a control premium, the ultimate holding was that a breach of fiduciary duty had occurred. The remedy, return of the control premium, may also be termed a return of the profits secured from a corporate opportunity that was wrongfully appropriated by Feldman. *See* Hill, *The Sale of Controlling Shares*, 70 HARV. L. REV. 986, 1006-10 (1957).

The court placed the source of the duty to minority shareholders on defendant's role "[b]oth as director and as dominant stockholder . . . ."[138] This court went on to hold that the minority shareholders had the right to recover individually[139] their share of the purchase price that was found to have been for "control."[140] *Perlman* stands for the proposition that a controlling shareholder must be careful in his sale of stock, because the control premium,[141] which is conveyed as an inseparable incident to any sale of his stock, may be found to have been held in trust for the corporation or for his fellow shareholders.[142]

When the sale of a controlling block of stock is involved, the fiduciary duty of the controlling shareholder obligates him not to transfer control to a purchaser who is likely to misuse corporate assets, or who is likely to "loot" the corporation.[143] The seller of corporate control is therefore obligated to investigate the business reputation of a potential acquirer.[144] In a greenmail context, which normally involves a tender offer for a controlling number of shares, it may be argued by directors who pay greenmail that they were obligated, as guardians of corporate control, to forestall an acquisition by a corporate raider. There is some merit in this argument, though it can also cloak a clandestine motive to retain positions of authority.[145]

Corporate control—unlike other corporate attributes—is often obscured by its union with various corporate offices. In *Perlman*, the defendant was not only the controlling shareholder, but also the president and chairman of the board.[146] Any one of these positions would suffice to trigger a fiduciary duty to the corporation. Control is also fluid; it flows from place to place depending upon various factors. In *Box v. Northrop Corp.*,[147] two major corporate creditors were held to owe a

---

[138]219 F.2d at 175.

[139]The reason for personal recovery appears to be that corporate recovery would merely benefit the acquiring control-holder. Though the rights of the minority shareholders derive from the sale of a corporate asset, the power to control, the minority was allowed to recover individually. The dissent by Judge Swan investigates this apparent contradiction. *Id.* at 180 (Swan, C.J., dissenting).

[140]*Id.* at 157. *See supra* note 137.

[141]*See generally* Easterbrook & Fischel, *Corporate Control Transactions*, 91 YALE L. J. 37 (1982).

[142]*See generally* O'Neal, *Symposium: Sale of Control*, 4 J. CORP. L. 239 (1979).

[143]DeBaun v. First Western Bank and Trust Co., 46 Cal. App. 3d 686, 120 Cal. Rptr. 354 (1975); Gerdes v. Reynolds, 28 N.Y.S.2d 622 (N.Y. Sup. Ct. 1941).

[144]"Those who control a corporation . . . owe some duty to the corporation in respect of the transfer of the control to outsiders. . . . [They] are under a duty not to transfer [control] to outsiders if the circumstances . . . are such as to awaken suspicion and put a prudent man on his guard . . . ." Insuranshares Corp. v. Northern Fiscal Corp., 35 F. Supp. 22, 25 (E.D. Pa. 1940).

[145]*See supra* notes 87-90 and accompanying text.

[146]219 F.2d at 175.

[147]459 F. Supp. 540 (S.D.N.Y. 1978), *aff'd mem.*, 598 F.2d 609 (2d Cir. 1979).

duty as *de facto* controllers to a minority shareholder.[148] The *Heckman* court refused to discuss whether or not a greenmailer was a controlling shareholder, but stated in a footnote: "[t]he question, a factual one, is what amount of influence [Steinberg] could exert on the corporation by reason of [his] holdings."[149]

When control is united with an office having a fiduciary duty to the corporation, it is not difficult to justify imbuing control with similar fiduciary obligations. It is only when control is exerted by a person with no apparent duty to the corporation that an issue arises. *Box* ultimately found the duty owed by corporate control (in the guise of corporate creditors) was not breached. This finding made unneccessary a detailed analysis of the nature and extent of such duties appurtenant to control.[150]

In a greenmail case, where a greenmailer used a tender offer for control to induce directors to repurchase his shares, it is difficult to term him a "controlling shareholder." " 'Control' is what a tender offeror ultimately seeks; it is not obtained until the tender offer succeeds."[151] Though the greenmailer certainly "direct[s] corporate conduct in such a way as to comport with [his] wishes or interests,"[152] his direction is limited to a single transaction—the extraction of greenmail. One commentator, in urging the extention of fiduciary duties to all control-holders, posits a situation "in which a person who wielded a noncorporate power over the majority shareholder, such as a *blackmailer*, could hold control . . . ."[153] Another commentator lists four forms in which control may be found. One form is a person "whose stockholdings are negligible—possibly nil—who is in a position to cause the directors of the corporation to resign . . . and elect successors of the control-holder's choosing."[154] The goal of a greenmailer is not so much a matter of replacing directors of a target corporation as it is a matter of influencing them to repurchase his shares at a premium price. Although the goal is different, the result, bending the policies of the corporation to one's will, is the same.

If one accepts the premise that corporate control is a corporate asset,[155] it is reasonable for a court to find that a greenmailer's surrender of his tender offer is a surrender of potential control. Any premium

---

[148]*Id.* at 547.

[149]*Heckman*, 168 Cal. App. 3d at 133 n.7, 214 Cal. Rptr. at 187 n.7.

[150]459 F. Supp. at 556.

[151]Appellant's Reply Brief at 14-15, *Heckman*.

[152]*Kaplan*, 284 A.2d at 123.

[153]Bayne, *supra* note 132, at 30 (emphasis added).

[154]Berle, *The Price of Power: Sale of Corporate Control*, 50 CORNELL L. REV. 628, 630 (1965).

[155]*See* Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

paid for this potential control may be regarded as a purchase of a corporate asset—control—and ought to be forfeited to the corporation. If, on the contrary, one believes that a shareholder may sell his shares for any price he can get,[156] a fact question may arise as to how much influence was exerted by the greenmailer upon the repurchasing directors. In determining the quantum of influence, significant attention must be given to the greenmailer's business reputation. Target directors and majority shareholders are required to take cognizance of a raider's probable motive;[157] courts ought to do no less.

An interpretation of *Jones v. H.F. Ahmanson & Co.*[158] would brand a greenmailer with an intermediate label, that of a "dominant" shareholder, a label also triggering fiduciary obligations. *Jones* restated the California business judgment rule as requiring "good faith and inherent fairness . . . in any transaction where control of the corporation is material."[159] Clearly a tender offer for corporate control falls within this category. And if the offeror does not qualify as a controlling shareholder, he certainly has a large influence, especially when he has financing arranged and is offering an attractive premium over market price. Considering these factors as well as the reputation of a "corporate raider," a court may well conclude that a greenmailer is a "dominant shareholder" in the same sense that the *Box* court concluded that the creditors of a corporation were *de facto* control-holders.

In *Jones*,[160] Chief Justice Traynor adopted the following quotation from *Pepper v. Litton*[161] as a statement of California common law to define the fiduciary duties of directors:

> 'He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stock-

---

[156] *See, e.g., Perlman*, 219 F.2d at 178-80 (Swan, C.J., dissenting).
[157] *See supra* note 145 and accompanying text.
[158] 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969).
[159] *Id.* at 112, 460 P.2d at 474, 81 Cal. Rptr. at 602.
[160] 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969).
[161] 308 U.S. 295 (1939).

> holders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*. Where there is a violation of these principles, equity will undo the wrong or intervene to prevent its consumation.' This is the law of California.[162]

This very same quotation was labelled by the *Heckman* court as "the shareholder's Magna Carta."[163] The *Heckman* court was willing to extend the fiduciary duties of a director at least far enough to bind a tender offeror. However, it should be emphasized that this is but one of two theories sufficient to give a possibility of success on the merits—it is not a judgment on the merits.[164]

If a fiduciary duty can be found to apply to a tender offeror, then the inherent fairness test of the California business judgment rule could be applicable.[165] While it may be fair for a greenmailer to purchase a control percentage from those willing to sell, especially at a premium price, it will probably not be fair to the minority to accept greenmail from the directors to cancel his tender offer.[166] Thus, a greenmailer will have no incentive to issue a tender offer unless he is willing to gain control of the target and has the ability to manage it more effectively than the current management.[167] Once he has effective control and exercises it, the greenmailer is subject to those fiduciary duties of a manager and director as well as to those applying to a control-holder. These duties will prevent any intention to "loot" the assets of the target corporation.

Whether termed a dominant shareholder or a controlling shareholder, a greenmailer will be held responsible for his acts by courts recognizing a common law fiduciary duty extending from a greenmailer to a shareholder. This solution satisfies both criteria stated above for an "ideal" source of fiduciary duty. It does not penalize directors as they would not be necessary parties where suit is brought for a breach of fiduciary

---

[162] *Jones*, 1 Cal. 3d at 108-09, 460 P.2d at 471-72, 81 Cal. Rptr. at 599-600 (quoting 308 U.S. at 311).

[163] *Heckman*, 168 Cal. App. 3d at 126, 214 Cal. Rptr. at 182.

[164] *See supra* notes 3-4 and accompanying text.

[165] *See supra* notes 81-86 and accompanying text.

[166] *See* Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505 (1965) (argument that when control is sold, the acquirer ought to be required to offer the same terms to minority shareholders).

[167] This argument coalesces with the efficiency justification for the free market, which postulates that in a "free" market, resources, including a entrepreneurial expertise, will naturally gravitate to maximize productivity. *See supra* note 8 and accompanying text.

obligation based upon the greenmailer's status as dominant or controlling shareholder. And directors would still be free to repurchase stock from dissident shareholders so long as the requirements of the business judgment rule and the inherent fairness test are met.

The drawback to the directors is that they may no longer preserve their positions of authority by paying out corporate funds as greenmail. However, this is hardly a drawback insofar as the shareholders are concerned; corporate directors ought not have that motivation in any case.

III. Conclusion

When faced with litigation involving greenmail, courts must first determine who the guilty parties actually are. If it appears that the incentive to repurchase stock came from the corporate directors, courts must determine whether the business judgment rule is applicable. If corporate control was not involved, it is most probable that the directors had a rational business purpose and the intricacies of the business judgment rule ought to be applied.

If, however, it appears that corporate control was at issue, the business judgment rule ought to be set aside and the concept of intrinsic fairness should dominate. If the directors had a legitimate interest in repelling a raider, their conduct must be measured against the high standards of a fiduciary. Likewise, a raider, actively seeking either control or greenmail, ought to be judged against this same high standard.

Ronald d'Avis

The Effect of the Statute of Limitations on Compulsory Counterclaims: An Analysis of Present Indiana Law

I. Introduction

The Indiana General Assembly recently reaffirmed the inherent power of the Indiana Supreme Court to adopt, amend, and rescind rules of court.[1] The significance of this legislative action is two-fold. First, the legislature recognizes that it is the exclusive prerogative of the Indiana Supreme Court to establish and abolish procedural rules governing the course of litigation.[2] Second, any legislative enactment that infringes upon that prerogative is invalid.[3] Indiana Code section 34-5-2-1 was enacted for the purpose of removing the conflict that would result from both the legislature and the supreme court promulgating rules of procedure.[4] Further, this section was enacted "to remedy . . . abuses and imperfections [which] may be found to exist in the practice."[5] This statute provides the Indiana Supreme Court with the unique opportunity to remedy the problem created by trial rule 13.

Trial rule 13 of the Indiana Rules of Trial Procedure requires a defendant in some cases,[6] and permits a defendant in all

---

[1] Ind. Code Ann. § 34-5-2-1 (West 1983).

[2] *See* Otterman v. Industrial Bd., Violent Crime Compensation Div., 473 N.E.2d 1021, 1021 (Ind. Ct. App. 1985).

[3] *Id.*

[4] Ind. Code Ann. § 34-5-2-1 (West 1983) states:

> All statutes relating to practice and procedure in any of the courts of this state shall have, and remain in, force and effect only as herein provided. The supreme court shall have the power to adopt, amend and rescind rules of court which shall govern and control practice and procedure in all the courts of this state; such rules to be promulgated and to take effect under such rules as the supreme court shall adopt, and thereafter all laws in conflict therewith shall be of no further force or effect. The purpose of this chapter is to enable the supreme court to simplify and abbreviate the pleadings and proceedings; to expedite the decision of causes; to remedy such abuses and imperfections as may be found to exist in the practice; to abolish all unnecessary forms and technicalities in pleading and practice; and to abolish fictions and unnecessary process and proceedings.

[5] *Id.*

[6] Ind. R. Tr. P. 13(A) states:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:
>
> (1) at the time the action was commenced the claim was the subject of

others,[7] to assert any claim that he may have against the plaintiff as a counterclaim in the same suit.[8] The defendant may seek and recover relief exceeding the amount sought by the plaintiff.[9] For example, if A sues B for $100 in personal property damages sustained in an automobile collision, B may counterclaim seeking $1,000 for personal injuries sustained in the same accident. If B wins, he may recover the full $1,000.

Trial rule 13(J) allows a defendant to assert a time-barred claim to the extent that it defeats or diminishes the plaintiff's claim.[10] If the applicable statute of limitations runs subsequent to the plaintiff filing his claim, but previous to the defendant filing his counterclaim, an issue arises as to whether the defendant's counterclaim is barred for the purposes of rule 13(J) or, on the other hand, whether the filing of the plaintiff's suit tolls the statute of limitations so that the defendant's counterclaim is not time-barred. Indiana law suggests that the defendant will be barred from asserting his claim to the extent that it exceeds the amount sought by the plaintiff.[11]

The Indiana Rules of Trial Procedure do not expressly indicate whether the filing of the plaintiff's claim tolls the statute of limitations for the defendant's counterclaim. Trial rule 13(J), which deals specifically with counterclaims that normally would be time-barred, simply establishes

---

another pending action; or

(2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

[7]IND. R. TR. P. 13(B) states: "[a] pleading may state as a counterclaim any claim against an opposing party not arising out of the same transaction or occurence that is the subject-matter of the opposing party's claim."

[8]The language of the rules does not specifically speak in terms of defendants and plaintiffs, but rather of parties asserting claims against other parties. For the purposes of clarity and illustration, this Note will address the defendant-counterclaimant model, although the law applies equally to the plaintiff-counterclaimant.

[9]*See* IND. R. TR. P. 13(C). "A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." *Id.*

[10]*See* IND. R. TR. P. 13(J)(1).

The statute of limitations, a nonclaim statute or other discharge at law shall not bar a claim asserted as a counterclaim to the extent that:

(1) it diminishes or defeats the opposing party's claim if it arises out of the transaction or occurence that is the subject-matter of the opposing party's claim, or if it could have been asserted as a counterclaim to the opposing party's claim before it (the counter-claim) was barred.

[11]*See, e.g.*, Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 v. Jefferson Trucking Co., 473 F. Supp. 1255 (S.D. Ind. 1979); Crivaro v. Rader, 469 N.E.2d 1184 (Ind. Ct. App. 1984); *In re* Estate of Compton v. Shelby Nat'l Bank, 406 N.E.2d 365 (Ind. Ct. App. 1980); Streets v. M.G.I.C. Mortgage Corp. and Assoc. Fin. Serv. Co. of Ind., 177 Ind. App. 184, 378 N.E.2d 915 (1978).

that such a counterclaim can offset the plaintiff's claim.[12] The rule says nothing about whether a defendant-counterclaimant may recover damages in excess of the damages sought by the plaintiff when the statute of limitations for filing an independent action by the defendant expires between the filing of the plaintiff's complaint and the filing of the counterclaim. Consequently, a defendant who has been hauled into court may be left without an adequate remedy.

The judicial responses in jurisdictions addressing this issue of the untimely counterclaim have been inconsistent; the courts have adopted various conflicting and confusing solutions.[13] Some courts have taken the view that the commencement of the plaintiff's action tolls the statute of limitations with respect to relief or claims for damages arising out of the same transaction or occurrence.[14] Others have held that the commencement of the plaintiff's action does not toll the statute of limitations where the defendant's counterclaim arises out of the same transaction or occurrence, except for those pleadings that the court considers to be purely defensive.[15] One reason invoked by these courts is that allowing the defendant to assert an otherwise time-barred claim, to the extent that it diminishes or defeats the plaintiff's claim, tempers the harshness that would result from totally barring the claim because it was filed too late.[16] Indiana follows this latter view.[17]

In addition to judicial responses, several state legislatures have enacted statutes to remedy the situation. Generally, where the matter has been governed by statute, the state legislatures have favored tolling the statute of limitations as to the defendant's counterclaim.[18] However,

---

[12]IND. R. TR. P. 13(J). Similarly, the federal rules do not address the issue. *See* FED. R. CIV. P. 13. There is no federal prototype to Indiana trial rule 13(J).

[13]*See, e.g.*, Wallace v. Patterson, 85 Mich. App. 266, 271 N.W.2d 194 (1978), *rev'd on other grounds*, 405 Mich. 825, 289 N.W.2d 924 (1979) (plaintiff's filing action tolls statute of limitations). *But see* Duhammel v. Star, 653 P.2d 15 (Ariz. Ct. App. 1982) (plaintiff's filing action does not toll statute of limitations).

[14]*See* Anton v. Lehpamer, 534 F. Supp. 239 (N.D. Ill. 1982); Azada v. Carson, 252 F. Supp. 988 (D. Hawaii 1966) (cited as majority rule); Armstrong v. Logsdon, 469 S.W.2d 342 (Ky. Ct. App. 1971); Wallace v. Patterson, 85 Mich. App. 266, 271 N.W.2d 194 (1978), *rev'd on other grounds*, 405 Mich. 825, 289 N.W.2d 924 (1979).

[15]*See* Duhammel v. Star, 653 P.2d 15 (Ariz. Ct. App. 1982); Di Norscia v. Tibbett, 50 Del. 118, 124 A.2d 715 (1956); Lovejoy v. Ahearn, 223 Tenn. 562, 448 S.W.2d 420 (1969).

[16]Crivaro v. Rader, 469 N.E.2d 1184, 1187 (Ind. Ct. App. 1984).

[17]*See, e.g.*, Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 v. Jefferson Trucking Co., 473 F. Supp. 1255 (S.D. Ind. 1979); Crivaro v. Rader, 469 N.E.2d 1184 (Ind. Ct. App. 1984); *In re* Estate of Compton v. Shelby Nat'l Bank, 406 N.E.2d 365 (Ind. Ct. App. 1980); Streets v. M.G.I.C. Mortgage Corp. and Assoc. Fin. Serv. Co. of Ind., 177 Ind. App. 184, 378 N.E.2d 915 (1978).

[18]*See, e.g.*, ILL. ANN. STAT. ch. 83 § 18 (Smith-Hurd 1966); N.Y. CIV. PRAC. LAW § 203(c) (McKinney 1972).

some states have enacted statutes definitively stating that untimely counterclaims seeking relief in excess of that sought by the plaintiff are barred if filed after the limitations period expires.[19]

Indiana does not have a statute that deals specifically with the effect of a statute of limitations on a compulsory counterclaim filed after the appropriate time period. Thus, Indiana courts have relied upon common law to address the issue of the effect of the statute of limitations on compulsory counterclaims.

Recently, the Indiana Court of Appeals was confronted with an untimely compulsory counterclaim in *Crivaro v. Rader*.[20] The court held that the plaintiff's commencement of the action did not toll the statute of limitations as to the defendant's counterclaim.[21] The defendant's counterclaim, which requested relief in excess of that sought by the plaintiff, was barred by the statute of limitations.[22] The court noted that its strict concern for the statute of limitations and recognition of the legislative prerogative in enacting statutes of limitation "overrode any justification . . . for extending the life of the counterclaim."[23] Pursuant to trial rule 13(J)(1), the court allowed the defendant to assert the time-barred claim to the extent that it diminished or defeated the opposing party's claim.[24]

The rationale used by the *Crivaro* court, mainly, strict adherence to limitation statutes so as not to defeat the purpose of the statutes, is analogous to the approach used by many jurisdictions that bar the defendant's untimely counterclaim.[25] However, such reasoning is less persuasive when analyzed from the perspective of the purposes served by limitation statutes as espoused by the courts.[26] The common law approach used by this and many other jurisdictions may lead to results that, in fact, defeat the purposes for which limitation statutes and rules of trial procedure were enacted.[27]

---

[19]*See, e.g.*, KAN. CIV. PRAC. CODE § 60-213(d) (Vernon 1963).

[20]469 N.E.2d 1184 (Ind. Ct. App. 1984).

[21]*Id.* at 1187.

[22]*Id.* at 1186-87.

[23]*Id.*

[24]*Id.* at 1187. Because Rader sought $1000 in damages (amount of deductible under his insurance policy), Crivaro was limited to this amount in his claim. Crivaro was not allowed to recover the $60,000 he sought in personal injuries.

[25]*See, e.g.*, Di Norscia v. Tibbett, 50 Del. 118, 124 A.2d 715 (1956); Brown v. Hipshire, 553 S.W.2d 570 (Tenn. 1977).

[26]The main purposes of a statute of limitations are to ensure that parties are given formal and reasonable notice that a claim is being asserted against them and to prevent the assertion of stale or fraudulent claims. *See* State *ex. rel.* Young v. Noble Circuit Court, 253 Ind. 353, 332 N.E.2d 99 (1975); *In re* M.D.H., 437 N.E.2d 119 (Ind. Ct. App. 1982).

[27]Rules of civil procedure, including appellate rules, were adopted in order to simplify

This Note will examine Indiana's position regarding the issue of whether the commencement of the plaintiff's action tolls the statute of limitations with respect to the defendant's compulsory counterclaim. First, this Note will survey the different judicial and legislative approaches of other jurisdictions. Second, Indiana's present position, as stated in the recent *Crivaro* decision, will be explained. Third, this Note will analyze Indiana's approach to the problem. This analysis will focus upon the common law background of compulsory counterclaims, the language and policy of trial rules, and the policy of statutes of limitation. The analysis suggests that trial rule 13(J), in its present form, is not dispositive of the issue of the untimely compulsory counterclaim; that common law and the language and policy of the Rules of Trial Procedure suggest that a compulsory counterclaim seeking affirmative relief should not be barred; and that the purposes of statutes of limitation are not defeated by allowing the time-barred claim. Finally, this Note recommends that Indiana law be changed to allow time-barred compulsory counterclaims, regardless of the type of relief sought, and proffers a solution to this effect.

II. Survey of Approaches Taken by Other Jurisdictions

A. Statute of Limitations Tolled for Defendant's Counterclaim

The courts are divided on the issue of whether the filing of a claim by a plaintiff tolls the statute of limitations as to a defendant's compulsory counterclaim.[28] The general rule holding that the commencement of an action by the plaintiff tolls the statute of limitations as to the defendant's then unbarred cause of action was stated in *Trinidade v. Superior Court*.[29] *Trinidade* involved an automobile collision and was a personal injury action brought by the driver of one automobile against the driver of the other within the applicable one year statute of limitations period.[30] The defendant, upon leave of court following a contested motion, brought a claim alleging personal injuries caused by the negligence of the plaintiff.[31] This counterclaim, which the defendant entitled a "cross-complaint," was filed more than two years after the cause of action arose and, therefore, outside the one-year statute of limitations period.[32] The appellate court stated that it had "consistently been held

---

and streamline prevailing procedural practice and to secure just, speedy, and inexpensive determination of every action. *See* Southern Ind. Rural Elec. Coop. v. City of Tell City, 179 Ind. App. 217, 384 N.E.2d 1145 (1979).

[28]*See supra* note 13.

[29]29 Cal. App. 3d 857, 106 Cal. Rptr. 48 (1973).

[30]*Id.*

[31]*Id.* at 858, 106 Cal. Rptr. at 49.

[32]*Id.* The statute of limitations on an action for injury caused by the neglect of another was one year.

that the commencement of an action tolls the statute of limitations as to a defendant's then unbarred cause of action against the plaintiff, 'relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, . . .' "[33] The court reasoned that the statute of limitations as to the defendant's counterclaim was tolled by the filing of the plaintiff's original complaint, permitting the defendant to assert any claim or defense which may be available, regardless of the fact that the defendant's claim would have been barred at the time of filing by the defendant if not for the tolling of the statute by the plaintiff.[34] Thus, if the plaintiff filed an action one day before the applicable statute of limitations had run on the defendant's counterclaim, the defendant, who in all likelihood would not be able to interpose a counterclaim before the end of the applicable limitations period, would be permitted to assert his claim for any type of relief within the time for serving a reponsive pleading.[35] This position has been cited as the majority rule.[36]

However, if the defendant's claim is already barred when the plaintiff brings the suit, this tolling theory would be inapplicable. Such a situation would arise when the period for the plaintiff to assert his claim is longer than that provided for the defendant.[37] When the plaintiff commences his action, the defendant's counterclaim is already barred. Hence, there is no limitations period to be tolled.[38]

Some courts have reasoned that, by commencing an action, the plaintiff has waived any defense of limitations.[39] According to this argument, by bringing the action, the plaintiff demonstrates that he does not desire to let rest the incident upon which the suit is founded. Thus, the defendant must be afforded the opportunity to assert or defend any claim that he may have.[40] The fact that the statute of limitations ran on the defendant's counterclaim before the plaintiff commenced his suit is immaterial, and the defendant is permitted to interpose his claim and survive a limitations defense.[41]

---

[33]*Id.* at 860-61, 106 Cal. Rptr. at 49-50 (citation omitted).

[34]*Id.*; *see also* Holtzendorff v. Housing Auth. of Los Angeles, 250 Cal. App. 2d 596, 58 Cal. Rptr. 886 (1967), *cert. denied*, 389 U.S. 1038 (1968); Whittier v. Visscher, 189 Cal. 450, 209 P. 23 (1922) (defendant's right of action alive when plaintiff commences suit; thus statute does not run against it).

[35]C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1419, at 108 (1971) [hereinafter cited as C. Wright & A. Miller].

[36]*See generally* Annot., 72 A.L.R. 3d 1065 (1976); 51 Am. Jur. 2d *Limitation of Actions* § 203 (1970); 54 C.J.S. *Limitations of Actions* § 285 (1948).

[37]Sobieski, *Counterclaims and Statutes of Limitation: A Critical Commentary on Present Tennessee Law*, 42 TENN. L. REV. 291, 302 (1975).

[38]*Id.* at 303.

[39]*See* Armstrong v. Logsdon, 469 S.W.2d 342 (Ky. Ct. App. 1971).

[40]*Id.* at 343.

[41]C. WRIGHT & A. MILLER, *supra* note 35.

B. Statute of Limitations Not Tolled for Defendant's Counterclaim

Several jurisdictions hold that a defendant's counterclaim is barred if filed after the expiration of the statute of limitation applicable to the plaintiff's cause of action unless the counterclaim is defensive in nature.[42] That is, the counterclaim may not seek recovery in excess of that sought by the plaintiff. Under this approach, the plaintiff's claim does not toll the statute of limitations for the defendant's counterclaim. If the counterclaim seeks recovery beyond that sought by the plaintiff, as distinguished from defensive remedies such as set-off and recoupment,[43] the defendant is essentially instituting an independent cause of action that is subject to the statute of limitations.[44] The courts have noted that the defendant could, and perhaps should, have brought a separate suit prior to the running of the statute of limitations.[45]

Although aware that a majority of courts allow defendants to bring compulsory counterclaims, the Delaware Supreme Court, in *Di Norscia v. Tibbett*,[46] distinguished that rule as involving cases where the counterclaim was used purely in a defensive stance, in the nature of a set-off or recoupment, and where no affirmative relief was sought. If the defendant's claim could be regarded as an independent action such that the defendant is seeking affirmative relief, the statute of limitations will apply to it as if it were a separate suit, and the untimely claim will be barred.[47] On the other hand, claims seeking set-off or recoupment or that are defensive in nature may still be asserted after the running of the statute of limitations.[48]

C. The Statutory Response

In a few states, statutory provisions allow the defendant-counterclaimant to assert a time-barred claim regardless of whether that claim

---

[42]*See supra* note 15.

[43]The defense of recoupment, which arises out of the same feature of the transaction upon which the plaintiff's claim is grounded, is never barred by the statute of limitations so long as the main action is timely. *See generally* 51 Am. Jur. 2d *Limitation of Actions* § 203 (1970).

[44]*See* Solomon v. Rosol, 10 Conn. Supp. 4 (1941).

[45]*See* Horace Mann Ins. Co. v. DeMirza, 312 So.2d 501 (Fla. Dist. Ct. App. 1975).

[46]50 Del. 118, 124 A.2d 715 (1956).

[47]*Id.* at 119, 124 A.2d at 717.

[48]*See, e.g.*, Unified School Dist. No. 490 v. Celotex Corp., 6 Kan. App. 2d 346, 629 P.2d 196 (1981); Lovejoy v. Ahearn, 223 Tenn. 562, 448 S.W.2d 420 (1969). However, even if a defendant's counterclaim is considered to be affirmative in nature, and therefore barred under this rule, some courts may permit the defendant to amend his answer to plead the defense of recoupment. *See* Horace Mann Ins. Co. v. DeMirza, 312 So. 2d 501 (Fla. Dist. Ct. App. 1975).

seeks what may be characterized as affirmative or defensive relief.[49] The filing of the plaintiff's claim tolls the statute of limitations as to the defendant's counterclaim for all purposes. The Illinois statute has been interpreted to allow the defendant to assert a claim if the claim was not barred at the time the plaintiff filed his original complaint.[50] The statute applies to all types of personal actions that the defendant may have against the plaintiff.[51] In addition to applying to compulsory counterclaims, the statute also extends to permissive counterclaims.[52] Even if the claim that tolled the statute of limitations is later dismissed, the defendant may have all other claims litigated in the action.[53] Thus, once the plaintiff files his complaint, the statute of limitations is effectively tolled as to any compulsory or permissive counterclaim that the defendant may assert against the plaintiff, even if one of these claims is later dismissed.

Similarly, New York has a provision in its code that allows the defendant to assert an untimely claim.[54] However, new claims asserted in amended pleadings have been held to be barred if based on grounds distinct from those asserted in prior pleadings.[55] The statute extends to cross-complaints and counterclaims seeking affirmative relief.[56] Accordingly, the courts have suggested that, in cases in which the claim asserted by the defendant relates to the same transaction that gave rise to the plaintiff's complaint, the defendant's claim should be allowed as a defense, counterclaim or cross-claim.[57]

---

[49]*See, e.g.*, ILL. ANN. STAT. Ch. 83 § 18 (Smith-Hurd 1966), which provides: "[a] defendant may plead a set-off or counter claim barred by the statute of limitation, while held and owned by him, to any action, the cause of which was owned by the plaintiff or person under whom he claims, before such set-off or counter claim was so barred, and not otherwise . . . ." *See also* N.Y. CIV. PRAC. LAW § 203(c) (McKinney 1972) ("a defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed . . . .").

[50]*See, e.g.*, Benckendorf v. Burlington N. R.R., 112 Ill. App. 3d 658, 445 N.E.2d 837 (1983); Carnahan v. McKinley, 80 Ill. App. 2d 318, 224 N.E.2d 297 (1967).

[51]*See* ILL. ANN. STAT. Ch. 83 § 18 (Smith-Hurd 1966).

[52]*See* Benckendorf v. Burlington N. R.R., 112 Ill. App. 3d 568, 445 N.E.2d 837 (1983).

[53]*See* Ogg v. City of Springfield, 121 Ill. App. 3d 25, 458 N.E.2d 1331 (1984).

[54]N.Y. CIV. PRAC. LAW § 203(c) (McKinney 1972).

[55]Seligson v. Chase Manhattan Bank, Nat'l Ass'n, 50 A.D.2 206, 376 N.Y.S.2d 899 (1975); Nichimen & Co. v. Framen Steel Supply Co., 44 Misc. 2d 260, 253 N.Y.S.2d 713 (N.Y. Sup. Ct. 1964).

[56]*See* Seligson v. Chase Manhattan Bank, Nat'l Ass'n., 50 A.D.2d 206, 376 N.Y.S.2d 899 (1975). Although N.Y. CIV. PRAC. LAW § 203(c) speaks only to defense and counterclaims, the court held that "despite the apparent legislative oversight, we see no reason why CPLR § 203(c) should not apply to cross-claims; particularly since '[a] cause of action in a counterclaim or cross-claim shall be treated' as far as practicable, as if it were contained in a complaint . . . ." *Id.*; 376 N.Y.S.2d at 904.

[57]*See* Nichimen & Co. v. Framen Steel Supply Co., 44 Misc. 2d 260, 253 N.Y.S.2d 713 (N.Y. Sup. Ct. 1964).

The purpose of these statutes has been to avoid potential injustice that would result if the court barred a defendant's counterclaim or cross-complaint that arose from the same accident or incident that gave rise to the plaintiff's suit.[58] Courts have reasoned that if the plaintiff is permitted to present a claim, the defendant should not be prevented from doing the same simply because of a "mere technicality."[59] Simple justice would seem to dictate that the defendant should be given the opportunity to present a claim for relief based upon the same accident or incident.[60]

A Kansas statute was interpreted to bar a defendant from asserting a counterclaim or cross-claim after the applicable statute of limitations expired, unless the defendant's claim was defensive in nature.[61] Currently, the statute provides:

> When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim or cross-claim could have been set up, neither can be deprived of the benefit . . . of the statute of limitations . . . but the two demands must be deemed compensated so far as they equal each other.[62]

In accord with this statute, Kansas courts have refused to allow the defendant to seek any type of affirmative relief.[63] Although the defendant is barred from seeking affirmative relief, he still has the right to use a counterclaim for purely defensive purposes.[64]

E. Summary

Courts outside Indiana are divided on the issue of the untimely counterclaim that arises out of the same accident or incident as the plaintiff's complaint.[65] The prevailing view suggests that, unless otherwise provided by statute, if a counterclaim, set-off, or cross-complaint is not barred by the statute of limitations when the action is commenced, it will not be barred while the action is pending.[66] The plaintiff's filing a

---

[58]*See* County of Westchester v. Edo Corp., 83 A.D.2d 829, 830, 441 N.Y.S.2d 553, 555 (1981).

[59]*See* Azada v. Carson, 252 F. Supp. 988, 989 (D. Hawaii 1966).

[60]*Id.*

[61]*See* Crumrine v. Cummings, 172 Kan. 290, 240 P.2d 463 (1952).

[62]KAN. CIV. PROC. CODE ANN. § 60-213(d) (Vernon 1963).

[63]*See* Lightcap v. Mobil Oil Corp., 221 Kan. 448, 562 P.2d 1 (1976), *cert. denied*, 434 U.S. 876 (1977).

[64]*See* Christenson v. Akin, 183 Kan. 207, 326 P.2d 313 (1958); Unified School Dist. No. 490 v. Celotex Corp., 6 Kan. App. 2d 346, 629 P.2d 196 (1981).

[65]*See supra* note 13 and accompanying text.

[66]*See supra* note 14 and accompanying text.

complaint tolls the statute of limitations as to the defendant's counterclaim. There is also authority to suggest that a pleading in the nature of a set-off, conterclaim, or cross-complaint that is regarded as an affirmative, as opposed to a defensive, claim is subject to the operation of the statute of limitations.[67] The defendant is not given the benefit of the tolling rule because he had the opportunity to institute an independent action against the plaintiff during the applicable statutory period.

III. Present Position in Indiana

The courts clearly have not resolved the question of whether the plaintiff, by instituting his action, tolls the statute of limitations with regard to compulsory counterclaims seeking affirmative relief asserted after the applicable statute of limitations has expired. Recent decisions suggest that Indiana is among those jurisdictions that bar the untimely compulsory counterclaim, unless it seeks to defeat or diminish the opposing party's claim or is purely defensive in nature.[68] A counterclaim asserted after the expiration of the statute of limitations is not permitted if the counterclaim is for affirmative relief.[69]

Crivaro v. Rader[70] is the most recent Indiana decision that addresses this issue. In *Crivaro*, two semi-tractor trailers collided. The plaintiff filed a complaint nineteen days before the expiration of the two-year statute of limitations, alleging negligence on the part of the defendant, Crivaro.[71] Rader sought $1,000 in damages.[72] Crivaro responded by filing a counterclaim in which he sought to recover $60,000 for personal injuries and property damage sustained in the collision.[73] The counterclaim was filed eight days after the running of the statute of limitations on the action.[74] Rader filed an answer to Crivaro's counterclaim, pleading as an affirmative defense that the statute of limitations had run on the counterclaim, and sought partial summary judgment to limit Crivaro's claim to

---

[67] *See supra* note 15 and accompanying text.

[68] *See* Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 v. Jefferson Trucking Co., 473 F. Supp. 1255 (S.D. Ind. 1979); Crivaro v. Rader, 469 N.E.2d 1184 (Ind. Ct. App. 1984); Streets v. M.G.I.C. Mortgage Corp. and Assoc. Fin. Serv. Co. of Ind., 177 Ind. App. 184, 378 N.E.2d 915 (1978).

[69] *See* Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 v. Jefferson Trucking Co., 473 F. Supp. 1255, 1258 (S.D. Ind. 1979).

[70] 469 N.E.2d 1184 (Ind. Ct. App. 1984).

[71] *Id.* at 1185.

[72] *Id.* This represented the amount of Rader's deductible under his insurance policy with plaintiff Harco National Insurance Company covering his 1974 International Harvester tractor, which was damaged in the collision.

[73] *Id.*

[74] *Id.* According to the court, Crivaro had eleven days after receiving notice of Rader's claim in which to file within the limitations period. *Id.* at 1187 n.7.

the amount of $1,000.[75] The trial court granted Rader's motion on the basis that Crivaro's claim was barred by the applicable statute of limitations except to the extent that it diminished or defeated Rader's claim asserted in the original complaint.[76]

The appellate court affirmed the lower court's holding.[77] The court reasoned that its concern for strict adherence to limitation statutes and recognition of legislative prerogative in this area "overrode any justification . . . for extending the life of the [untimely] counterclaim."[78] Prior to determining that Crivaro's counterclaim was barred, the court dispensed with the plaintiff's and defendant's arguments in support of their positions. The court found that neither the cases cited by the defendant nor the plaintiff's construction of rule 13(J)(1) were dispositive of the issue.[79] The defendant noted that the issue before the court was not addressed or resolved by Indiana trial rule 13(J).[80] The defendant argued that prior Indiana cases, specifically *Eve v. Louis*[81] and *Zink v. Zink*,[82] allowed a claim seeking affirmative relief to be asserted and litigated in the same suit even if the time for filing an independent action had expired.[83] However, the *Crivaro* court distinguished the earlier Indiana cases cited by the defendant in much the same manner as the *Di Norscia* court distinguished the majority rule regarding the tolling of statutes of limitation for counterclaims.[84] The *Crivaro* court stated that the Indiana cases that allowed the defendant to assert the untimely counterclaim were distinguishable on the basis that the counterclaims sought relief that was defensive in nature.[85]

The *Crivaro* court was quick to accept the defendant's argument that trial rule 13(J) does not address the issue of whether a claim that is not barred at the time the plaintiff files the action and that seeks affirmative relief is barred by the statute of limitations.[86] Nonetheless,

---

[75]*Id.* at 1185. *See also* IND. R. TR. P. 56(C). The rule includes the following language: "[a] summary judgment may be rendered upon less than all the issues or claims, including without limitation the issue of liability or damages alone although there is a genuine issue as to damages or liability as the case may be." *Id.*

[76]469 N.E.2d at 1185.

[77]*Id.* at 1187. Judge Shields wrote the opinion for the court. Chief Judge Buchanan and Judge Sullivan concurred.

[78]*Id.*

[79]*Id.* at 1185.

[80]Brief for Appellant at 5-6, *Crivaro*, 469 N.E.2d 1184.

[81]91 Ind. 457 (1883).

[82]56 Ind. App. 677, 106 N.E. 881 (1914).

[83]*See Eve*, 91 Ind. 457; *Zink*, 56 Ind. App. 677, 106 N.E. 381.

[84]*See supra* note 46 and accompanying text.

[85]469 N.E.2d at 1185.

[86]*See supra* note 80.

the court rejected further arguments of the defendant and affirmed the trial court's refusal to permit affirmative recovery by way of a time-barred counterclaim.[87] The *Crivaro* court ultimately based its finding on the proposition that the purposes of the statute of limitations would best be served by barring the untimely counterclaim.[88] Because statutes of limitation are legislative creations, the courts would be engaging in judicial legislation by construing limitation statutes in such a manner that would allow the defendant to assert the time-barred compulsory counterclaim.[89]

The *Crivaro* court noted that Indiana courts have emphasized that statutes of limitations are statutes of repose, "founded upon a rule of necessity and convenience and the well-being of society."[90] In *Bennett v. Bennett*,[91] cited by the *Crivaro* court, it was noted that limitation statutes "are grounded upon the presumption that one having a well-founded claim will not delay enforcing it."[92] The court reminded the defendant that "the aim of limitation statutes [is] to encourage those with meritorious claims to enforce them without delay."[93] Concluding that Crivaro's counterclaim was barred by the statute of limitations, the court applied trial rule 13(J)(1) and allowed the defendant to assert the time-barred claim to the extent that it diminished or defeated the plaintiff's claim.[94]

IV. Analysis of the Indiana Approach

A. Common Law and Trial Rule 13(J)

The *Crivaro* court stated that neither the cases cited by the defendant nor the construction of trial rule 13(J) supported by the plaintiff was dispositive of the issue of the untimely counterclaim.[95] However, Indiana common law may suggest that trial rule 13(J) should be interpreted to allow time-barred claims regardless of the type of relief sought by the defendant.

As a general rule, under early common law recoupment and set-off procedures, a defendant could gain relief within the confines of the action only by diminishing or defeating the plaintiff's claim.[96] A defendant

---

[87] 469 N.E.2d at 1187.

[88] *Id.* at 1186-87.

[89] *Id.*

[90] *Id.* (citing Indiana Dep't of State Revenue v. Estate of Puett, 435 N.E.2d 298 (Ind. Ct. App. 1982)).

[91] 172 Ind. App. 581, 361 N.E.2d 193 (1977).

[92] *Id.* at 585, 361 N.E.2d at 196.

[93] 469 N.E.2d at 1187.

[94] *Id.*

[95] *Id.* at 1185.

[96] C. Wright & A. Miller, *supra* note 35, § 1425, at 137 (1971).

could not seek affirmative relief.[97] In *Crivaro*, the court distinguished the *Eve*[98] and *Zink*[99] cases on the basis that the relief sought by the defendants in those cases was defensive; therefore, the claims were not barred.[100] Indiana common law was such that a defendant could recover on a counterclaim only that which recoupment and setoff procedures allowed.[101]

However, the notion that counterclaim relief must be limited to that which defeats or diminishes the opponent's relief apparently never had full currency in Indiana equity practice.[102] Indiana allowed setoff in certain cases independent of specific statutory authority.[103] Equitable setoffs were not all mutual,[104] but were granted by courts in equity to prevent irremediable injustice.[105] From the early courts' interpretation and application of setoffs, it was clear that the relief sought in counterclaims could exceed the amount or be different in kind from the relief asked for by the plaintiff; a defendant could seek recovery in excess of that sought by the plaintiff.[106] Further, setoff in the form of affirmative relief was codified in the early 1900's[107] and later adopted in the Indiana Rules of Trial Procedure.[108] Trial rule 13(C) continues the liberal practice laid down by the Indiana courts and makes it clear that there is no procedural limitation on the type of claim which may be interposed in a counterclaim.[109]

Trial rule 13(J) makes an exception for the filing of common law recoupment and setoff after the statutory period has expired.[110] The counterclaim must be compulsory in nature.[111] The drafters used the

---

[97] *Id.*

[98] 91 Ind. 457 (1883).

[99] 56 Ind. App. 677, 106 N.E. 881 (1914).

[100] 469 N.E.2d at 1185.

[101] *See supra* note 48; *see also* Teeters v. City Nat'l Bank of Auburn, 214 Ind. 498, 14 N.E.2d 1004 (1938). "Legal setoff is wholly statutory in Indiana and is a counteraction growing out of an independent transaction pleaded by the defendant to counterbalance the plaintiff's recovery and to recover judgment in his own favor." *Id.* at 501, 14 N.E.2d at 1005.

[102] *See* Eigenman v. Clark, 21 Ind. App. 129, 51 N.E. 725 (1898).

[103] *See* Wolcott v. Pierre, 100 Ind. App. 16, 188 N.E. 596 (1934).

[104] *Id.*

[105] Keightley v. Walls, 24 Ind. 205 (1865); McKinney v. Pure Oil Co., 129 Ind. App. 223, 154 N.E.2d 53 (1958); Anderson v. Biggs, 118 Ind. App. 266, 77 N.E.2d 909 (1948).

[106] *See* Love v. Oldham, 22 Ind. 51 (1864); Gordon v. George, 12 Ind. 408 (1859); Reardon v. Higgins, 39 Ind. App. 363, 79 N.E. 108 (1906).

[107] *See* IND. CODE ANN. § 2-2508 (Burns 1948).

[108] *See* IND. R. TR. P. 13(C).

[109] IND. R. TR. P. 13(C) comment (Discussion Draft 1968).

[110] *See* Albert Johann & Sons Co., v. Echols, 143 Ind. App. 122, 238 N.E.2d 685 (1968); *see* IND. R. TR. P. 13(J).

[111] *See* IND. R. TR. P. 13(J)(1).

same defensive terms, such as "diminish" and "defeat," that were used by the courts.[112] The question therefore arises as to whether trial rule 13(J) was drafted with the intent of making an exception for the entire range of recovery available at common law under the compulsory counterclaim, including the common law remedies of recoupment and setoff. As noted, a defendant could seek affirmative or defensive relief under common law setoff.[113] Although trial rule 13(J), in its present form, uses defensive terms, it arguably was intended to allow affirmative recovery. The issue, in light of common law, may not be whether the compulsory counterclaim seeking affirmative relief is time-barred, but whether trial rule 13(J) is intended to allow compulsory counterclaims to be filed after the applicable statute of limitations for any purpose. The use of defensive terms by the drafters of the trial rules is unfortunate and has led to much confusion as to the actual purpose of this rule. Common law and the exception supposedly created by trial rule 13(J) suggest that compulsory counterclaims seeking relief in excess of that sought by the plaintiff were not intended to be time-barred, but to be included in the exception.[114] In its present form, however, trial rule 13(J) does not come into play until the defendant's claim is deemed time-barred.

B. Affirmative Versus Defensive Relief

Under the present trial rule 13(J), an additional problem arises as to the difficulty that courts may have in distinguishing clearly between counterclaims seeking affirmative relief and those primarily for defensive purposes.[115] This distinction has been used by many courts, including those in Indiana, to allow or to bar an untimely counterclaim.[116] According to this approach, if the defendant asserts the counterclaim after the applicable statute of limitations has expired and he is seeking damages in excess of the amount sought by the plaintiff, the counterclaim is affirmative and therefore barred by the statute of limitations.[117] Such a distinction becomes increasingly confusing when the defendant is not seeking monetary damages, but instead is seeking equitable relief, such as specific performance of a contract or injunctive or declaratory relief.

---

[112]*Id.*

[113]*See* Love v. Oldham, 22 Ind. 51 (1864); Gordon v. George, 12 Ind. 408 (1859); Reardon v. Higgins, 39 Ind. App. 363, 79 N.E. 208 (1906).

[114]*See supra* notes 110-112 and accompanying text.

[115]*See, e.g.*, Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 v. Jefferson Trucking Co., 473 F. Supp. 1255 (S.D. Ind. 1979); Di Norscia v. Tibbett, 50 Del. 118, 124 A.2d 715 (1956).

[116]*See supra* note 17.

[117]*See supra* note 15 and accompanying text.

A counterclaim asserted by way of a set-off or recoupment or that seeks to diminish or defeat the plaintiff's claim is defensive in nature.[118] At present, Indiana will permit the adjudication of untimely counterclaims premised upon only defensive theories.[119] This distinction as to the type of relief sought by the defendant is confusing and inappropriate. There is no explicit or implied provision in the Indiana Rules of Trial Procedure that even suggests that compulsory counterclaims should be distinguished in such a manner.[120]

C. Language and Policy of Trial Rules Suggests Defendant's Compulsory Counterclaim Not Intended to be Barred

The language and policy of the Indiana trial rules suggests that compulsory counterclaims were not intended to be subject to the running of the statute of limitations. Rule 13 requires that a defendant interpose a counterclaim if it arises out of the "same transaction or occurrence" that gave rise to the plaintiff's claim.[121] The term "transaction or occurrence" was intended to be interpreted broadly so as to avoid multiple law suits.[122] The language expressly provides that "any" claims arising from the "same transaction or occurrence" should be brought in the same suit.[123] The rule does not prohibit untimely compulsory counterclaims. Implicit in this rule is the notion that judicial economy would best be served by litigating all claims, even those filed after the applicable statute of limitations for the plaintiff's claim had expired.[124] As long as the defendant's counterclaim arises out of the same transaction or occurrence, there is little reason why it should not be adjudicated with other related claims in a single proceeding.

Yet, according to the holding in *Crivaro*, if a plaintiff files a negligence action one day before the running of the statute of limitations, the defendant, who would probably be unable to answer and file a counterclaim before the statutory period expires, would be barred from asserting that counterclaim if he sought relief greater than that sought by the plaintiff. It would be irrelevant that the defendant's claim arose from the same accident as the plaintiff's claim, except to the extent that

---

[118]*See supra* notes 94-95 and accompanying text.

[119]*See supra* note 17.

[120]*See* IND. R. TR. P. 13. Nor is there such a provision in the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 13.

[121]IND. R. TR. P. 13(A).

[122]*See* Daube and Cord v. LaPorte County Farm Bureau Co-op. Ass'n, 454 N.E.2d 891, 893 (Ind. Ct. App. 1983); *see also* IND. R. TR. P. 13(A) comment (Discussion Draft 1968).

[123]IND. R. TR. P. 13(A).

[124]*Cf.* Bristol Farmers Mkt. and Auction Co. v. Arlen Realty & Dev. Corp., 589 F.2d 1214 (3d Cir. 1978).

the court would allow the defendant to assert a claim which diminishes or defeats the plaintiff's claim.[125] Thus, if the plaintiff is found fully liable, the defendant will not be allowed to recover anything. The Indiana position seemingly ignores the merit of the defendant's claim and punishes the defendant for not bringing an independent action. Surely the legislature did not intend such an unjust result when it adopted the Rules of Trial Procedure.

In addressing the issue of the untimely counterclaim, the *Crivaro* court directs its analysis toward the relief sought by the defendant.[126] This analysis is misdirected in that the court is adhering to the defensive labels developed at common law as a means for barring untimely counterclaims. Regardless of the defendant's actual losses from the accident or incident that gave rise to the plaintiff's claim, the defendant is limited to seeking only that relief which defeats or diminishes the plaintiff's claim, if he wants his fair day in court.[127]

Earlier Indiana cases and the trial rules themselves suggest that the court's analysis should be directed toward the transaction or occurrence that gave rise to the plaintiff's claim.[128] If the defendant's counterclaim arose from the same transaction or occurrence as the plaintiff's cause of action, the defendant's counterclaim is compulsory in nature, and he should be allowed to have that claim litigated regardless of the relief sought or the expiration of the limitation period. No further inquiry should be made by the court.

Nowhere do the rules distinguish as to the type of relief sought by the defendant-counterclaimant as a means for barring the untimely compulsory counterclaim.[129] Similarly, there is nothing to suggest that compulsory counterclaims were intended to be barred by statutes of limitation. Indiana trial rule 13(A) was specifically enacted to avoid multiple law suits arising from the same accident or incident,[130] yet a court would suggest a defendant with a meritorious claim should have filed that claim before the plaintiff filed his claim.

Allowing a time-barred counterclaim is entirely consistent with the purposes and policies with which the rules were enacted by the state legislature.[131] The rules of trial and appellate procedure were adopted

---

[125]*See* IND. R. TR. P. 13(J).

[126]469 N.E.2d at 1185.

[127]*See* IND. R. TR. P. 13(J).

[128]*See* Eve v. Louis, 91 Ind. 457 (1883); Zink v. Zink, 56 Ind. App. 677, 106 N.E. 381 (1914).

[129]*See generally* IND. R. TR. P. 13.

[130]*See* Daube and Cord v. LaPorte County Farm Bureau Co-op. Ass'n, 454 N.E.2d 891, 893 (Ind. Ct. App. 1983).

[131]*See supra* note 27.

in order to simplify the procedural process.[132] One purpose of the rules was to liberalize the practice of trial courts and courts of appeal, to reduce technical burdens, not to increase them.[133] The courts and drafters of the rules have suggested that, in order for the rules to achieve the ends of orderly and speedy jurisprudence, the rules should be liberally construed.[134] A broad construction of the rules would allow every litigant the opportunity to have his day in court. Trial rule 13 is no exception.

Such a liberal interpretation is supported by trial rule 1, which expressly states that the trial rules "shall be construed to secure the just . . . determination of every action."[135] Other trial rules also suggest that this approach would comply with the basic policy of the rules. Rule 6 allows a defendant a time period within which to file a responsive pleading.[136] Rule 13 requires that compulsory counterclaims be asserted in the responsive pleading.[137] To deny the defendant the opportunity to seek full recovery under a counterclaim that is not barred at the time the plaintiff initiates the action denies the defendant the full time within which he is authorized to file a responsive pleading.[138] Tolling the statute of limitations for the compulsory counterclaim, in contrast, allows the defendant his day in court. The tolling approach thus provides the defendant the rights and benefits of the trial rules and is therefore entirely consistent with the overall philosophy of the rules.[139]

Additionally, the purpose of trial rule 13(J) is more correctly reflected in the tolling approach. In a jurisdiction that adopts the tolling approach, the defendant is allowed to assert the counterclaim if it was not barred when the plaintiff instituted the suit, thus receiving the benefit of the tolling of the limitations period in regard to his counterclaim. If the defendant's counterclaim was already barred when the plaintiff filed his complaint, trial rule 13(J) nevertheless allows the defendant to defeat or diminish the plaintiff's claim.[140] According to Wright and Miller,

---

[132]Southern Ind. Rural Elec. Coop. v. City of Tell City, 179 Ind. App. 217, 384 N.E.2d 1145 (1979).

[133]*See* Perry v. Baron, 152 Ind. App. 29, 281 N.E.2d 544 (1972).

[134]*See* American States Ins. Co. v. State *ex rel.* Jennings, 152 Ind. App. 422, 284 N.E.2d 873 (1972).

[135]IND. R. TR. P. 1, which states:

> Except as otherwise provided, these rules govern the procedure and practice in all courts of the State of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin. They shall be construed to secure the just, speedy and inexpensive determination of every action.

[136]IND. R. TR. P. 6(C) states that "[a] responsive pleading required under the rules, shall be served within twenty [20] days after service of the prior pleading."

[137]IND. R. TR. P. 13(A).

[138]*See supra* note 136.

[139]*See supra* notes 132-34 and accompanying text.

[140]*See* IND. R. TR. P. 13(J).

although the defendant cannot seek affirmative relief on his counterclaim, courts have properly held that the defendant may assert a counterclaim to the extent that it defeats or diminishes the plaintiff's recovery.[141] This interpretation makes the rule entirely consistent with rule 13 as a whole because rule 13(J) is not applicable if the counterclaim could have been asserted at the time the plaintiff initiated the action.

D. Purposes Served by the Statute of Limitations Are Not Defeated by Allowing the Untimely Claim

The argument that the purpose of the statute of limitations would be defeated by allowing untimely counterclaims to be litigated may be misleading.[142] Indiana holds that limitation statutes are statutes of repose.[143] These statutes are favored by the courts, but are not intended to be construed so as to reach absurd results.[144] The primary purpose of such statutes is to ensure that parties are given formal and reasonable notice that a claim is being asserted against them[145] and to prevent the assertion of stale or fraudulent claims.[146] The purpose of the statute of limitations would not be defeated by litigating the untimely compulsory counterclaim.

If the object of the statute of limitations is to give formal notice to all parties that a claim is being asserted against them,[147] this purpose is fulfilled when the plaintiff files the action before the expiration of the applicable limitations period. As long as the plaintiff's action is timely, whether the action was filed immediately after the accident or occurrence or on the last day of the statutory period, this objective is met once the defendant receives notice. As long as the defendant receives notice, it is irrelevant whether he receives it after the expiration of the limitations period. There is subsequently little justification for barring the defendant's claim because both parties then have reasonable notice of the timely filed action.

When the plaintiff asserts the original action, he has demonstrated that he does not desire to lay to rest the underlying transaction or occurrence. Because the plaintiff's claim is not considered stale if it is

---

[141] C. WRIGHT & A. MILLER, *supra* note 35, § 1419, at 110 (1971).

[142] *See Crivaro*, 469 N.E.2d at 1184.

[143] *See* Kemper v. Warren Petroleum Corp., 451 N.E.2d 1115 (Ind. Ct. App. 1983); Indiana Dep't of State Revenue v. Estate of Puett, 435 N.E.2d 298 (Ind. Ct. App. 1982); Bennett v. Bennett, 172 Ind. App. 581, 361 N.E.2d 193 (1977).

[144] *See* Hamrick v. Indianapolis Humane Soc'y, Inc., 174 F. Supp. 403 (S.D. Ind. 1959), *aff'd*, 273 F.2d 7 (7th Cir. 1959), *cert. denied*, 362 U.S. 919 (1959).

[145] *See* State *ex. rel* Young v. Noble Circuit Court, 263 Ind. 353, 332 N.E.2d 99 (1975).

[146] *See In re* M.D.H., 437 N.E.2d 119 (Ind. Ct. App. 1982).

[147] *See supra* note 145.

filed before the applicable statute of limitations, it is illogical to say that the defendant's counterclaim, arising out of the same incident, is stale simply because it is filed some time later. As long as the defendant's counterclaim arises from the same transaction or occurrence, it should be no more stale than the plaintiff's claim.[148] The court's initial inquiry should thus be limited to matters directly related to that event which triggered the plaintiff's claim. Any concern for potentially stale evidence regarding the defendant's counterclaim is minimal if evidence of the same transaction or occurrence is not stale as to the plaintiff's claim.[149] This necessarily close relationship between the timely claim and the untimely counterclaim ensures that the latter is not stale in the sense that evidence and witnesses are no longer available;[150] the evidence is equally available for adjudicating all claims arising out of the same transaction or occurrence.

Allowing a party in a motor vehicle collision to wait until the last moment to file a complaint in hopes of evading liability or reducing the extent of exposure on a counterclaim only encourages last minute filing of claims.[151] Such a policy cannot be rationalized as consistent with the purposes of statutes of limitations.[152] Allowing the defendant to assert the compulsory counterclaim may, in fact, reduce the filing of fraudulent claims by plaintiffs. A plaintiff would be less likely to assert a fraudulent claim near the end of the applicable statute of limitations if it were clear that the defendant would be allowed to counter the plaintiff's claim and seek affirmative recovery.

Allowing the defendant to assert the time-barred claim thus promotes justice and efficiency. All interested parties are likely to have notice of any counterclaim filed in response to the original claim, and evidence regarding the underlying transaction or occurrence is equally available for litigating both claims. In addition, allowing the defendant's counterclaim reduces fraudulent claims and removes any incentive for attorneys to postpone filing the original complaint until shortly before the statute of limitations runs.

E. Potential for an Independent Action Should Not Bar the Counterclaim

The *Crivaro* court suggested that if the defendant had a meritorious claim, he should have initiated an independent action.[153] However, the

---

[148]*See* Armstrong v. Logsdon, 469 S.W.2d 342, 343 (Ky. Ct. App. 1971).

[149]*Id.*

[150]C. WRIGHT & A. MILLER, *supra* note 35, § 1419, at 109, 110 (1971).

[151]Brief of Appellant at 10-11, *Crivaro*, 469 N.E.2d 1184 (Ind. Ct. App. 1984).

[152]*Id.*

[153]469 N.E.2d at 1187 nn. 7,8.

failure of a defendant to assert an independent action does not mean that his claim lacks merit.[154] A defendant's inaction may be the result of several factors. It may reflect an uncounseled ignorance of the law regarding his rights and privileges.[155] The defendant may also have intended to lay the matter to rest, an intention that was unexpectedly altered by the filing of the plaintiff's claim.[156] Additionally, the defendant may be completely surprised that the plaintiff would bring any action based upon the particular incident. Yet, regardless of the specific reasons why a defendant chose not to assert an independent action, as long as none of the policies underpinning the statute of limitations are defeated, the potentially meritorious counterclaim should be litigated in the same proceeding.

F. Justice and Fairness Would Best Be Served by Adjudicating the Untimely Counterclaim.

The policies of justice and fair play would best be served by allowing the adjudication of both the plaintiff's timely claim and the defendant's untimely counterclaim. The defendant's counterclaim should, of course, be brought within a reasonable time during the pendency of the lawsuit.[157] Simple justice dictates that if the plaintiff has the opportunity to present a claim based on a particular event, the defendant should not be prevented from having his claim adjudicated because of a mere technicality.[158] After all, it is the defendant who is being hauled into court against his will by the plaintiff.

Judicial and legislative action can mitigate the harshness of denying the defendant's counterclaim.[159] A majority of courts now hold that, where a plaintiff institutes an action in a timely manner, the running of the statute of limitations is tolled as long as the counterclaim was not barred at the commencement of the plaintiff's action.[160] Legislatures have enacted statutes to the same effect.[161]

The *Crivaro* court declined the invitation to adopt a tolling rule, for it perceived such action as judicial legislation.[162] Yet, it is the Indiana

---

[154]Although Crivaro was seeking $60,000 in damages compared to Rader's $1,000, the court is the proper forum to determine the validity of each claim. *See id.* at 1187. *See generally* Foster v. New, 407 N.E.2d 271 (Ind. Ct. App. 1980). "The complaint is not subject to dismissal unless it appears to a certainty that [a party] would not be entitled to relief under any set of facts." *Id.* at 273 (citation omitted).

[155]*See* Sobieski, *supra* note 37, at 293-94.

[156]*Id.* at 294.

[157]*See* Wallace v. Patterson, 85 Mich. App. 266, 271 N.W.2d 194 (1978), *rev'd on other grounds,* 405 Mich. 825, 289 N.W.2d 924 (1979).

[158]*See* Armstrong v. Logsdon, 469 S.W.2d 342, 343 (Ky. Ct. App. 1971).

[159]*See supra* notes 14 and 49-56 and accompanying text.

[160]*See supra* note 36.

[161]*See supra* notes 49-56 and accompanying text.

[162]469 N.E.2d at 1187 (quoting *Di Norscia*, 50 Del. at 120, 124 A.2d at 717).

Supreme Court's prerogative to establish Indiana procedural rules.[163] The Indiana General Assembly has reaffirmed this inherent power of the state supreme court to adopt, amend and rescind rules affecting matters of procedure and practice.[164] Thus, the Indiana Supreme Court could pass on this most important issue either directly or on appeal from the lower courts. If the Indiana courts decline to adopt a tolling rule, the legislature could enact such a statute to remedy the present situation, as it is the legislature that has the authority to adopt or amend statutes of limitation.[165]

V. Suggested Statutory Response

State legislatures have enacted statutes that allow the defendant to assert a counterclaim after the expiration of the applicable statute of limitations if the counterclaim was not barred at the time the original complaint was filed.[166] The statutes make no distinction as to the type of relief sought or the type of action from which the claim arose[167] and allow the defendant to assert an untimely compulsory counterclaim.[168] Such statutes have been upheld on judicial review. In Indiana, however, the Rules of Trial Procedure are silent regarding how to deal with an untimely compulsory counterclaim.[169] The courts have held that the untimely counterclaim may not be litigated, but the rationale for this result seems to conflict with the policies behind the procedural rules and statutes of limitation.[170]

A statute broad enough to allow the defendant to assert any claim that arises out of the same transaction or occurrence that gave rise to the plaintiff's action[171] would be consistent with trial rule 13. The defendant should, however, be required to assert his claim within a reasonable time after receiving notice of the plaintiff's claim.[172] Additionally, the statute should require that the defendant's claim be ac-

---

[163]*See* Otterman v. Industrial Bd., Violent Crime Compensation Div., 473 N.E.2d 1021 (Ind. Ct. App. 1985). "[I]t is the exclusive prerogative of the Indiana Supreme Court to establish procedural rules governing the course of litigation, and any legislative enactment which infringes upon that perogative must yield." *Id.* (citations omitted).

[164]*See* Ind. Code § 34-5-1-2 (West 1983).

[165]*Crivaro*, 469 N.E.2d 1184.

[166]*See supra* note 49.

[167]*See id.* and accompanying text.

[168]*See* Benckendorf v. Burlington N. R.R., 112 Ill. App. 3d 658, 445 N.E.2d 837 (1984); Seligson v. Chase Manhattan Bank, Nat'l Ass'n., 50 A.D.2d 206, 376 N.Y.S.2d 899 (1975).

[169]*See generally* Ind. R. Tr. P. 13.

[170]*See supra* note 17 and accompanying text.

[171]*See supra* note 49 and accompanying text.

[172]*See generally* Ind. R. Tr. P. 6(C). A reasonable time may be the twenty [20] day period required under the trial rules for responsive pleadings.

tionable when the plaintiff's complaint was filed. If the defendant's claim was not valid at that time, trial rule 13(J)(1) would apply to allow the defendant to assert a claim that arises out of the same transaction or occurrence and that seeks to diminish or defeat the opposing party's claim.[173] Thus, for all practical purposes, the suggested statute would effectively toll the limitations period as to the defendant's claim.

VI. Conclusion

A defendant should be allowed to assert a counterclaim in excess of the amount sought by the plaintiff so long as the claim was not barred by the applicable statue of limitations at the time the plaintiff's complaint was filed and the counterclaim arose out of the same transaction or occurrence as the plaintiff's action. The reasoning in *Crivaro* is not consistent with the purposes behind the statute of limitations. The policies of the statute of limitations are not related to the type of relief or the amount of recovery, but instead address only the question of the timeliness of the plaintiff's claim.

Present law in Indiana concerning the effect of the statute of limitations on compulsory counterclaims is in need of revision. The current focus of judicial analysis is on the type of relief sought in the counterclaim, but the rationale is often confusing and arguably incorrect in light of Indiana common law, the language and policies of the trial rules, and the purposes of statutes of limitation.

A tolling rule should be adopted by the Indiana Supreme Court or enacted by the legislature, with regard to statutes of limitation, to remedy this procedural problem. The rule should allow the assertion of the untimely counterclaim, regardless of the type or amount of relief sought, so long as both claims arose out of the same transaction or occurrence and the defendant's claim was not barred when the plaintiff's claim was interposed. The counterclaim should, however, be filed within a reasonable time during the pendency of the lawsuit. Such a response by the Indiana Supreme Court or the legislature would lead to fairer procedural jurisprudence in Indiana.

John R. Gaskin

---

[173] *See* Ind. R. Tr. P. 13(J).

The Negligent Infliction of Emotional Distress: A Critical Analysis of Various Approaches to the Tort in Light of *Ochoa v. Superior Court*

I. Introduction

The negligent infliction of emotional distress is a tort that has evolved rapidly since 1968.[1] This rapid evolution has caused courts to analyze and apply the concept in vastly different ways. Four general approaches have emerged out of the chaos — the impact rule, the zone of danger approach, the pure foreseeability approach, and the *Dillon* test. The advantages and disadvantages of each of these views have been the subject of much debate.[2] To date, the "best" approach appears to be an unanswered question.

California broke new ground in this area of the law. In *Dillon v. Legg*,[3] the California Supreme Court created a three-prong foreseeability test as a guideline for determining a defendant's duty to a bystander who witnesses the death or injury of a loved one.[4] Although the *Dillon* approach has been generally well received, it has also provoked some valid criticisms.[5]

---

[1] W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on the Law of Torts § 54 (5th ed. 1984) [hereinafter cited as Prosser & Keeton]. The negligent infliction of emotional distress has been defined as "a tort against the integrity of the family unit." Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983). "The existence of a marital or intimate familial relationship is the nucleus of the personal interest to be protected." *Id.*

[2] *See, e.g.*, Maragos, *Negligent Infliction of Emotional Distress — Mixed Signals?*, 8 West St. U.L. Rev. 139 (1981); Nolan and Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging From Chaos*, 33 Hastings L.J. 583 (1981-82); Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm — A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477 (1982); Note, Molien v. Kaiser Foundation Hospitals: *California Expands Liability for Negligently Inflicted Emotional Distress*, 33 Hastings L.J. 291 (1981-82); Comment, *Bystander Recovery for Negligent Infliction of Emotional Distress in Iowa: Implementing an Optimal Balance*, 67 Iowa L. Rev. 333 (1981-82); Comment, *Negligent Infliction of Emotional Distress Absent Physical Impact or Subsequent Physical Injury*, 47 Mo. L. Rev. 124 (1982); Comment, *Negligent Infliction of Emotional Distress in New Jersey: Compensating the Foreseeable Plaintiff*, 32 Rutgers L. Rev. 796 (1979); Note, *Recovery for Negligently Inflicted Mental Distress Permitted to Mother Who Witnessed the Violent Death of Her Child Even Though the Mother was Outside Zone of Danger*, 25 Vill. L. Rev. 195 (1979-80).

[3] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[4] *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[5] *See, e.g.*, D'Ambra v. United States, 114 R.I. 643, 665, 338 A.2d 524, 535 (1975) (Joslin, J., dissenting) (*Dillon* approach provides no rational way to limit liability); *see also infra* text accompanying notes 126-55.

Recently, the California Supreme Court was given an opportunity to clarify the application of the *Dillon* test in a factually distinguishable case and thereby eliminate the criticisms of *Dillon*. In *Ochoa v. Superior Court*,[6] the court declined this opportunity. The *Ochoa* court ignored the unsettled debate as to the best approach in mental distress cases and the conflict in its own case law. It limited its holding to the facts of the case and added a few variations to prior case law.[7] The result was the addition of another conflicting mental distress case to a collection of discordant case law.

This Note will survey the benefits and criticisms of each of the four approaches to the tort of negligent infliction of emotional distress. Next, this Note will review the cases that have followed *Dillon* and elucidate the inconsistencies in the case law. The *Ochoa* case will also be analyzed with respect to its inconsistencies with prior *Dillon* progeny, its internal reasoning, and its effect upon future mental distress law in *Dillon* jurisdictions and in jurisdictions that use other approaches. Finally, this Note will propose a more just and equitable solution: a flexible and relaxed standard for liability coupled with an increased burden of proof for recovery.

II. Various Approaches to Negligent Infliction of Emotional Distress: Different Solutions to Common Problems

The courts have used four vastly different approaches to the tort of negligent infliction of emotional distress: the impact rule, the zone of danger rule, the pure foreseeability approach, and the *Dillon* foreseeability test. Each approach merits a discussion of its advantages and disadvantages.

A. The Impact Rule

The impact rule was the original, and most limiting, of all the mental distress approaches.[8] The jurisdictions that follow this rule allow no cause of action for negligently inflicted emotional distress unless the plaintiff suffers a contemporaneous physical impact.[9] Accordingly, a bystander who witnesses an injury to another cannot recover for his mental distress absent a physical impact.[10]

---

[6]39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

[7]*Id.* at 170-72, 703 P.2d at 8-9, 216 Cal. Rptr. at 668-69.

[8]Prosser & Keeton, *supra* note 1, at § 54.

[9]*E.g.*, Estate of Harper v. Orlando Funeral Home, Inc., 366 So. 2d 126 (Fla. Dist. Ct. App. 1979); Harkcom v. East Texas Motor Freight Lines, Inc., 104 Ill. App. 3d 780, 433 N.E.2d 291 (1982); Orkin Exterminating Co. v. Walters, 466 N.E.2d 55 (Ind. Ct. App. 1984); Merluzzi v. Larson, 96 Nev. 409, 610 P.2d 739 (1980).

[10]*E.g.*, *Harkcom*, 104 Ill. App. 3d 780, 433 N.E.2d 291.

Several rationales have been advanced in favor of the impact rule. First and foremost, the physical impact rule allows certainty of liability.[11] The defendant may be found liable for the plaintiff's mental distress only if he caused a physical impact upon the plaintiff. Because the impact rule provides simplicity and consistency to the question of liability, some courts have continued to use it, even though its other benefits are doubtful.[12]

The impact rule satisfied the courts' general distrust of emotional distress claims.[13] First, the courts thought the impact rule prevented speculative damage awards.[14] Limiting liability to cases involving impact was thought to limit recovery to situations where the emotional injury could be substantiated.[15] Actual mental injury was thought to be more probable when the plaintiff suffered a physical impact than when he did not.[16] Therefore, the impact rule validated emotional distress awards by restricting them to cases where actual mental injury was most probable.

Even if medical science could establish mental injury to a reasonable degree of certainty, advocates of the impact rule argued that causation of those damages would be difficult to prove absent impact.[17] Even if the mental damage could be established, there was no proof that the defendant's conduct was the proximate cause of the injury in question.[18] Thus, physical impact was required to prove causation.[19]

By substantiating the injury and causation elements of the cause of action, the impact rule reduced the potential for fraudulent claims.[20] The argument was that if one could not establish mental injury or causation to any degree of medical certainty, then the potential for fraudulent claims would increase.[21] Thus, as impact substantiated both mental injury and causation, it decreased the opportunity for fraud.

Moreover, the impact rule prevented potential theoretical problems. First, the courts were fearful of a flood of litigation over trivial claims if the impact restriction were removed.[22] A physical impact limited

---

[11]*See generally* PROSSER & KEETON, *supra* note 1, § 54 at 363-64.

[12]The impact rule originally provided causation and proof of damages when medical science could not. Today, the medical field has made great advances in the areas of psychiatry and mental illness, and such proof is no longer needed. Towns v. Anderson, 195 Colo. 517, 579 P.2d 1163 (1978).

[13]PROSSER & KEETON, *supra* note 1, § 54 at 363.

[14]*Towns*, 195 Colo. 517, 579 P.2d 1163.

[15]*Id.*

[16]*Id.*

[17]*See* Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979).

[18]*See id.*

[19]*See id.*

[20]*See Towns*, 195 Colo. at 519, 579 P.2d at 1164.

[21]*See id.*

[22]*See Sinn*, 486 Pa. at 162, 404 A.2d at 680.

litigation to cases deserving recovery.[23] Second, once the impact restriction was removed, liability would be greatly extended and difficult to limit at any stage.[24] The courts feared the lack of a rational basis for limiting liability.[25] Thus, absent the impact requirement, it was thought that the courts would eventually be forced to recognize a cause of action for mental distress under any circumstances.[26] Finally, the elimination of the impact rule was thought to impose a new duty upon the defendant.[27] A new duty created a new cause of action.[28] Therefore, judicial conservatism favored the retention of the impact rule.[29]

Although the impact rule was initially a majority approach to the negligent infliction of emotional distress, it has fallen into disfavor in recent years.[30] Many of the rule's rationales have become outmoded.

The most important reason for the decline of the impact rule was the advance in medical science in the area of mental ailments.[31] Psychiatry can now prove injury and causation to some degree.[32] Thus, the potential for fraudulent claims, absent impact, is reduced.[33]

Furthermore, the flood of litigation argument has been rejected as a valid reason for requiring physical impact.[34] A court's caseload is, by itself, an unacceptable reason for denying recovery where it is deserved.[35] In fact, those courts that have abandoned the impact rule have not encountered an increase in this type of litigation.[36]

Finally, the impact rule has been criticized as arbitrary, capricious, and inequitable.[37] Requiring impact denies deserving plaintiffs a recovery for a sometimes debilitating injury.[38] An emotional injury can be as devasting to one's health as a physical injury[39] and therefore also deserves

---

[23]PROSSER & KEETON, *supra* note 1, § 54 at 363.

[24]Tobin v. Grossman, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969).

[25]*Id.*

[26]*Id.*

[27]*Id.* at 613, 249 N.E.2d at 421, 301 N.Y.S.2d at 556.

[28]*Id.*

[29]*Id.* at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

[30]*See, e.g., Towns*, 195 Colo. 517, 579 P.2d 1163; PROSSER & KEETON, *supra* note 1, at § 54.

[31]*See, e.g.*, Culbert v. Sampson's Supermarket, 444 A.2d 433, 435 (Me. 1982).

[32]*See, e.g., Sinn*, 436 Pa. at 158, 404 A.2d at 678.

[33]*Id.*

[34]*Id.* at 162-63, 404 A.2d at 680-81.

[35]*Id.* at 163, 404 A.2d at 681; *see also* Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939).

[36]*See Sinn*, 486 Pa. at 162 n.12, 404 A.2d at 680 n.12.

[37]*E.g.*, Bass v. Nooney Co., 646 S.W.2d 765, 769 (Mo. 1983) (en banc).

[38]*See* Estate of Harper v. Orlando Funeral Home, Inc., 366 So. 2d 126 (Fla. Dist. Ct. App. 1979).

[39]*See, e.g.*, Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978) (mother died from shock of witnessing daughter being hit by car).

compensation. The rule is arbitrary because it has been used as a legal fiction.[40] For example, smoke, dust, trivial burns, or jolts may supply the impact necessary for recovery.[41] Because claims of pain and suffering in physical injury suits may be fraudulent or exaggerated, the argument that physical impact in emotional distress suits reduces fraud is unfounded.[42] These serious criticisms of the impact rule have led many courts to abandon it in favor of one of the newer approaches.

B. Zone of Danger

The zone of danger rule is succinctly stated in the Restatement (Second) of Torts. Section 313 provides:

> (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
>
> (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and
>
> (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.
>
> (2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, *unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.*[43]

In other words, the actor will not be found liable for a bystander's emotional distress unless: (1) the actor's conduct was negligent; (2) it was foreseeable that the bystander would suffer distress; and (3) the bystander was within the zone of danger created by the defendant's conduct.[44] Many states follow this zone of danger approach.[45]

The zone of danger rule has several advantages. First, the zone of danger determination is objective and can be readily and consistently

---

[40]PROSSER & KEETON, *supra* note 1, § 54 at 363.

[41]*Id.* at 363-64.

[42]*See, e.g.*, Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

[43]RESTATEMENT (SECOND) OF TORTS § 313 (1965) (emphasis added).

[44]*Id.*

[45]*E.g.*, Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979) (en banc); *Towns*, 195 Colo. 517, 579 P.2d 1163; Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980); Vaillancourt v. Medical Center Hosp. of Vt., Inc., 139 Vt. 138, 425 A.2d 92 (1980); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

applied.[46] The zone of danger rule permits a simple determination of which persons may recover.[47]

Second, the defendant's liability is based to some degree upon his reasonable expectations of what injury could result from his conduct.[48] If the defendant injures a small child, he should expect a parent to be nearby and to suffer severe mental distress from realization of the child's injury.[49] Although this rationale does not apply in every situation, it does give some legitimacy to the rule.[50]

Finally, the courts have used some of the same rationales for the zone of danger rule that supported the impact rule. The zone of danger approach limits liability by limiting the class of persons who may recover.[51] Thus, the rule arguably prevents a flood of litigation.

Despite its positive aspects, the rule has many drawbacks. The zone of danger rule is considered to be an unnecessary, narrow, rigid, and unjust limitation on the class of persons who may recover.[52] For example, the rule denies recovery to a mother who sees her child hit by a car from a distance, yet allows recovery to a mother who stood a few feet closer to the accident.[53] Both mothers would foreseeably suffer the same emotional injury. In this respect, the rule fails to protect worthy interests.[54] Thus, limiting recovery by physical distance is as arbitrary as requiring a physical impact.[55]

Finally, the courts that have abandoned the zone of danger approach in favor of more expansive approaches have not encountered an increased number of fraudulent claims[56] or a flood of litigation.[57]

C. Pure Foreseeability

Two jurisdictions have adopted a new approach to the negligent infliction of emotional distress. Both Ohio[58] and Hawaii[59] have expanded

---

[46]*E.g.*, *Stadler*, 295 N.W.2d at 554.

[47]*Dziokonski*, 375 Mass. at 564, 380 N.E.2d at 1300.

[48]*See* PROSSER & KEETON, *supra* note 1, § 54 at 366.

[49]*Id.*

[50]For example, a wife who witnesses a husband's injury could reasonably suffer severe mental distress yet not be a foreseeable witness to the defendant.

[51]*See* Culbert v. Sampson's Supermarket, 444 A.2d 433, 436 (Me. 1982).

[52]*Id.*

[53]In *Dillon*, the trial court dismissed the mother's claim based on the zone of danger rule because the mother witnessed the accident from a few feet further than the victim's sister, who was allowed to proceed with her claim. *Dillon*, 68 Cal. 2d at 732, 441 P.2d at 915, 69 Cal. Rptr. at 75.

[54]*E.g.*, Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979).

[55]*Sinn*, 486 Pa. at 157, 404 A.2d at 677-78.

[56]*See id.* at 162 n.12, 404 A.2d at 680 n.12.

[57]*See id.*

[58]Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

[59]Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974).

liability on a "pure foreseeability" basis. Where serious emotional distress to a plaintiff-bystander is the reasonably foreseeable consequence of the defendant's negligent act, liability is imposed based on the application of general tort principles.[60]

Many of the previous restrictions upon liability are absent in the "pure foreseeability" approach. The plaintiff's recovery is not limited to situations where the defendant actually causes injury or death to another.[61] The defendant's act need not result in physical harm to the victim.[62] In addition, the plaintiff has a cause of action for emotional distress for negligent damage to his personal[63] or real[64] property. Moreover, if the bystander's emotional distress is serious, physical harm is not required.[65] Without the requirements of actual physical harm to a third person or resulting physical injury to the plaintiff from his distress, the pure foreseeability approach allows recovery in a broad range of circumstances.[66]

The pure foreseeability approach has one additional advantage over previous approaches. It defines the tort in a manner that conforms to other aspects of negligence law[67] by basing duty on foreseeability principles.[68] In addition, the plaintiff must prove a breach of duty, causation, and harm.[69] The only limitation imposed upon recovery, other than the usual negligence constraints, is that the distress must be serious,[70] which is determined objectively.[71] Once the objective threshold is met, the plaintiff may recover for any distress actually suffered.[72]

The scope of recoverable damages also conforms to other aspects of tort law.[73] If the defendant had caused a bodily injury to the plaintiff, he would be liable for pain and suffering.[74] Therefore, if he causes a

---

[60]Rodrigues v. State, 52 Hawaii 156, 174, 472 P.2d 509, 520 (1970).

[61]*Paugh*, 6 Ohio St. 3d at 80, 451 N.E.2d at 767.

[62]*Id.*

[63]Campbell v. Animal Quarantine Station, 63 Hawaii 557, 632 P.2d 1066 (1981) (recovery for mental distress due to death of family dog).

[64]*Rodrigues*, 52 Hawaii 156, 472 P.2d 509 (recovery for mental distress due to negligent damage to house).

[65]*See id.* Emotional distress is serious when "a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* at 173, 472 P.2d at 520.

[66]*See, e.g., Campbell*, 63 Hawaii 557, 632 P.2d 1066 (distress from death of dog); *Leong*, 55 Hawaii at 398, 520 P.2d at 758 (distress from seeing step-grandmother killed); *Rodrigues*, 52 Hawaii 156, 472 P.2d 509 (distress from damage to home).

[67]*See, e.g., Leong*, 55 Hawaii at 408, 520 P.2d at 764-65.

[68]*Id.*

[69]*Id.* at 407, 520 P.2d at 764.

[70]*Rodrigues*, 52 Hawaii at 172-73, 472 P.2d at 520.

[71]*See supra* note 65.

[72]In tort law, the plaintiff may recover for any injury actually suffered under the "Eggshell Skull" theory. PROSSER & KEETON, *supra* note 1, § 43 at 291-92.

[73]*See Leong*, 55 Hawaii 398, 520 P.2d 758.

[74]*See Paugh*, 6 Ohio St. 3d at 75, 451 N.E.2d at 763.

mental injury, regardless of the source of the distress, he should be liable for the pain and suffering or distress that such an injury involves.[75]

Despite these advantages, the courts have struggled to utilize the pure foreseeability theory without extending liability beyond what would be expected.[76] The greatest difficulty with the pure foreseeability approach is the determination of the defendant's duty. While all courts that have used this approach agree that foreseeability is the basis of duty, the courts are in conflict as to what must be foreseeable to impose that duty.

One view is that duty is based upon a foreseeable injury.[77] The plaintiff may recover if his mental distress was reasonably foreseeable.[78] This approach is too broad. Many of life's events cause reasonably foreseeable mental distress. For example, rejection of a child by his social peers may cause foreseeable distress to the child's parents. Likewise, a car accident that killed a distant relative to the plaintiff could foreseeably cause mental distress. Thus, this broad test of foreseeable injury imposes a duty in situations that the law may not deem worthy of compensation.

Another approach to duty used under the pure foreseeability rule is the foreseeable plaintiff.[79] The defendant's duty is limited to the risks of his negligent act.[80] The defendant owes a duty only to those plaintiffs who are foreseeably endangered by the risks that made the conduct unreasonably dangerous.[81] Despite this limitation upon duty, the courts have struggled with liability beyond that which the defendant could or should expect.[82] For example, the defendant could be liable for emotional distress of the victim's entire family because they are foreseeable plaintiffs.[83] Thus, despite the objective that emotional distress should conform to other aspects of negligence law, the courts began to impose arbitrary restrictions, such as distance, upon duty.[84] Limiting liability by geographical distance between the event and the plaintiff creates the same problems as the zone of danger approach.[85]

---

[75]*Id.* at 77, 451 N.E.2d at 765.

[76]*See, e.g.*, Kelley v. Kokua Sales & Supply, 56 Hawaii 204, 532 P.2d 673 (1975) (plaintiff must be located within reasonable distance from accident in "pure foreseeability" cases even though physical distance should not alone bar recovery).

[77]*See Leong*, 55 Hawaii at 408, 520 P.2d at 764-65.

[78]*Id.*

[79]*See Rodrigues*, 52 Hawaii at 174, 472 P.2d at 521.

[80]*Id.*

[81]*Id.*

[82]*See Kelley*, 56 Hawaii 204, 532 P.2d 673.

[83]Before *Kelley* was decided, any "foreseeable" plaintiff could have recovered. *See Rodrigues*, 52 Hawaii 156, 472 P.2d 509.

[84]*See Kelley*, 56 Hawaii at 209, 532 P.2d at 676.

[85]*See supra* notes 53-57 and accompanying text.

The extension of duty to mental distress caused by injury to property has also been a source of controversy. Recovery for emotional distress caused by property loss promotes materialism.[86] Furthermore, a plaintiff who is economically compensated for property loss should not objectively suffer severe emotional distress. In other words, the defendant would not expect that an economically compensated loss would cause severe emotional distress. While there may be some basis for emotional distress when the defendant destroys unique and irreplaceable property, the courts have not specifically limited duty in this manner.[87] Thus, under this approach, a plaintiff could recover for emotional distress resulting from damage to his car, boat, or clothes. Although an individual could foreseeably develop an emotional attachment to these items, the defendant has no reasonable expectation of liability. Until these theoretical conflicts are settled, most courts will probably not follow the pure foreseeability approach.

D. The Dillon *Approach*

The final approach to the negligent infliction of emotional distress is that espoused in *Dillon v. Legg*.[88] *Dillon* was a classic example of the problems associated with the zone of danger approach. A child was negligently struck and killed by the defendant automobile driver. Both the victim's mother and sister suffered severe emotional distress from observing the accident. Because the sister had been standing a few feet closer to the victim, she was within the zone of danger, while the mother was not. Therefore, the trial court dismissed the mother's claim. On review of the dismissal, the California Supreme Court held that the plaintiff should recover if the defendant should foresee fright or shock severe enough to cause substantial injury in a person "normally constituted."[89]

The California court carefully delineated guidelines for the determination of the defendant's duty. These guidelines are: 1) "Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it;"[90] 2) "Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence;"[91] and 3) "Whether

---

[86] *E.g., Rodrigues*, 52 Hawaii at 178-79, 472 P.2d at 522-23 (Levinson, J., concurring and dissenting).

[87] *See, e.g., id. Rodrigues* dealt with the negligent flooding of plaintiff's home. There is no indication that such a decision would not be extended to other property items.

[88] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[89] *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[90] *Id.*

[91] *Id.*

plaintiff and the victim [are] closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship."[92] The court noted that while the defendant's duty could not be predetermined in every instance, that duty should be based upon the degree of foreseeability;[93] the case should be governed by general rules of tort law, including the concepts of negligence, proximate cause, and foreseeability.[94]

Many courts follow the *Dillon* approach.[95] *Dillon* discards arbitrary limitations on the defendant's duty in favor of a more rational foreseeability approach.[96] The imposition of duty by the foreseeability factors set forth in *Dillon* comports with public policy.[97] Public policy demands a remedy for one who suffers a wrong.[98] Courts have considered that this method does not drastically increase the defendant's burden, as the departure from prior law is only in the scope of recognizable damages flowing from the negligent conduct.[99]

The *Dillon* foreseeability test is a middle-of-the-road approach. It recognizes the benefits of using foreseeability to determine duty, yet limits the duty where pure foreseeability cannot. It balances the need for flexible plaintiff recovery against the hardship of unlimited liability for the defendant. The *Dillon* standard incorporates the foreseeable plaintiff test with the foreseeable mental injury test.[100] Despite the theoretical soundness of such an approach, however, California courts have struggled with its application in non-conventional situations.

III. The California Conflict — The Aftermath of *Dillon* and the *Ochoa* Decision

Dillon became the basis for an entire line of mental distress cases. These cases culminated in the recent case of *Ochoa v. Superior Court*.[101]

---

[92] *Id.*

[93] *Id.* at 740, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

[94] *Id.* at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.

[95] *See, e.g.*, D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (1973); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Miller v. Cook, 87 Mich. App. 6, 273 N.W.2d 567 (1978); Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979); Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980); Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979); General Motors Corp. v. Grizzle, 642 S.W.2d 837 (Tex. Ct. App. 1982).

[96] *See, e.g., Culbert*, 444 A.2d at 437.

[97] *See Sinn*, 486 Pa. at 161-67, 404 A.2d at 680-83.

[98] *See id.* at 167, 404 A.2d at 683.

[99] *Id.*

[100] *See Dillon*, 68 Cal. 2d at 739, 441 P.2d at 919-20, 69 Cal. Rptr. at 79-80.

[101] 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

In *Ochoa*, the court changed *Dillon* appreciably without answering the questions raised by the *Dillon* progeny or by the debate as to which mental distress theory is best.

A. The Ochoa *Decision*

The *Ochoa* case dealt with the death of a thirteen-year-old boy. The child was being held in a juvenile hall when he became severely ill with bilateral pneumonia. The defendant doctor misdiagnosed the child as having influenza. He visited the child twice in two days, despite repeated communications by the plaintiff-mother that further treatment was needed. Mrs. Ochoa visited her son and found him extremely ill and in severe pain. Despite Mrs. Ochoa's pleas, no x-rays, blood tests, or urine tests were performed. She was denied the opportunity to take her child to their family physician. Mrs. Ochoa visited her son several times, but was not present when he died. Her husband, also a plaintiff in the suit, visited the child once while he was ill. The child died three days after the onset of his illness.

In addition to suing on several other grounds, Mr. and Mrs. Ochoa sued for their mental distress caused by the doctor's negligence in mistreating their son. The trial court dismissed their claim for negligent infliction of mental distress.[102] The plaintiffs then sought a writ of mandate to compel the trial court to reinstate several causes of action, including their mental distress claim.[103] The California Supreme Court held that both plaintiffs had a cause of action for the distress they suffered as a result of their observation of the defendant's conduct, the child's injury, and their contemporaneous awareness that the defendant's conduct or lack thereof was causing injury to the child.[104] Furthermore, the court held that the injury to the victim need not be caused by a sudden occurrence.[105] Requiring the injury to be sudden arbitrarily limits liability when the shock to the plaintiff is highly foreseeable, especially when the shock flows from an abnormal event.[106]

B. The Dillon *Progeny: Cases and Conflicts*

To understand the import of *Ochoa*, the *Dillon* progeny must be analyzed. In the decisions following *Dillon*, three main areas of conflict have arisen. The first area of controversy involves the definition of "contemporaneous" in the second portion of the *Dillon* foreseeability

---

[102] *Id.* at 164, 703 P.2d at 4, 216 Cal. Rptr. at 664.
[103] *Id.*
[104] *Id.* at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668.
[105] *Id.* at 168, 703 P.2d at 7, 216 Cal. Rptr. at 667.
[106] *Id.*

test. The guideline requires a contemporaneous perception of the injury-producing event.[107] In cases in which the plaintiff gains knowledge of the victim's injury well after its occurrence, the courts consistently hold the plaintiff has no cause of action for mental distress.[108]

When the plaintiff sees the injury immediately after it was inflicted, however, the courts are split as to whether the observation is "contemporaneous" with the injury-producing event. In *Archibald v. Braverman*,[109] a mother heard an explosion and rushed to the scene to find her son had suffered traumatic amputation of his hand. The court held that her shock was contemporaneous with the explosion, even though she did not observe the event.[110] Other cases have stretched either facts or reasoning to find that the plaintiff's observation of the injury was contemporaneous. In *Krouse v. Grahm*,[111] the plaintiff was sitting in his car when the defendant struck both the car and the plaintiff's wife. The plaintiff did not see the impact. The court held that the husband did "contemporaneously observe" the incident because he was a percipient witness to the impact, knew his wife's position beforehand, saw the defendant approaching, and must have realized the car struck her.[112] The court apparently used "constructive knowledge" to find a "contemporaneous" observation of the event.

In *Nazaroff v. Superior Court*,[113] the court stretched the facts to find a contemporaneous observation of the injury-producing event. In *Nazaroff*, a child drowned in a swimming pool. His mother, alerted by a neighbor's cry, arrived on the scene in time to see the boy's body pulled from the pool. The court held that the mother had contemporaneously observed the drowning because drowning is not an instantaneous event, but a continuous process of reduction of blood-gas levels.[114]

In contrast, other California courts have interpreted the contemporaneous requirement strictly. In *Parsons v. Superior Court*,[115] the plaintiffs were following their daughters in a car when the defendant driver of the daughters' car rounded a curve and crashed. The parents did not see the accident, but arrived on the scene "before the dust had

---

[107] *Dillon*, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[108] *See, e.g.*, Madigan v. City of Santa Ana, 145 Cal. App. 3d 607, 193 Cal. Rptr. 593 (1983) (parents did not have a cause of action for mental distress because they did not arrive at the scene of their son's auto accident until 15 minutes after its occurrence).

[109] 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

[110] *Id.* at 256, 79 Cal. Rptr. at 725.

[111] 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

[112] *Id.* at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872.

[113] 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978).

[114] *Id.* at 566-67, 145 Cal. Rptr. at 664.

[115] 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).

settled." The court held the plaintiffs did not have a contemporaneous observation of the injury-producing event and dismissed the suit.[116]

Similarly, in *Hathaway v. Superior Court*,[117] a child was electrocuted on an outdoor cooler. The parents, who were indoors, were alerted by the child's friends. They ran outside to find their son lying in a pool of water, gagging and spitting. The child did not die until later. Evidence introduced at trial suggested that electrocution is not an instantaneous event, but a process that may require time. Despite this evidence, the court held that the parents did not contemporaneously observe the event because the child was no longer touching the cooling unit when they arrived.[118] This strict interpretation of "contemporaneous observation" directly contradicts the holdings of *Archibald* and *Nazaroff*.

The second area of conflict in the application of the *Dillon* test is the definition of sensory perception. Perception of the event, other than by sight, has been difficult to define consistently. For example, a mother who witnesses the defendant's act and her child's injury has been held to perceive the event although she was unaware of the negligence at that time.[119] Yet, if the plaintiff directly perceives the negligence and not the injury, he has not sensorily perceived the injury-producing event.[120] Furthermore, courts have included the sense of touch as a sensory perception of the event. A mother in labor who felt her contractions cease and her baby nod its head was held to have a sensory perception of the death of the fetus.[121] It is difficult to imagine that this was actually a sensory perception of death. It is unlikely the mother actually gained direct knowledge at that moment that the fetus was injured. Thus, it appears that the court has stretched the concept of sensory perception to include perception of an event that does not include contemporaneous knowledge of the injury. Therefore, the definition of sensory perception needs to be clarified.

The third area of conflict developed in the reasoning of the "direct victim" approach used in *Molien v. Kaiser Foundation Hospitals*.[122] In that case, the defendant-doctor negligently misdiagnosed the plaintiff's wife as having syphilis. The doctor advised the wife to have her husband undergo treatment. The stress and suspicion of sexual infidelity caused the marriage to dissolve. The court held that the plaintiff-husband was

---

[116]*Id.* at 512, 146 Cal. Rptr. at 498.

[117]112 Cal. App. 3d 728, 169 Cal. Rptr. 435 (1980).

[118]*Id.* at 736, 169 Cal. Rptr. at 440.

[119]*See* Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976).

[120]Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

[121]Johnson v. Superior Court, 123 Cal. App. 3d 1002, 1007, 177 Cal. Rptr. 63, 65 (1981).

[122]27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

a direct victim of the defendant's negligent act.[123] The court stated that the *Molien* facts were distinguishable from the *Dillon* scenario.[124] Under *Molien*, the plaintiff has a cause of action without proof of physical injury resulting from his distress.[125] The court noted that the physical injury requirement is an arbitrary and artificial limit on recovery.[126] The physical injury requirement allows recovery when distress is trivial and denies it in cases where recovery is deserved.[127]

Shortly thereafter, another case embellished the direct victim theory. In *Andalon v. Superior Court*,[128] parents sued for the wrongful birth of a child with Down's syndrome. The court stated that the parents had a cause of action under the direct victim theory even though they had not witnessed the gene mutation considered to be the "injury-producing event."[129] Thus, under a direct victim analysis, plaintiffs need not prove sensory perception of the injury-producing event.

The lack of both a physical injury requirement and a sensory perception requirement conflicts with cases following *Dillon*. Yet there appears to be little rational basis for the different standard used under the *Molien* analysis. A "direct victim" is not more likely to have suffered mental distress than a bystander in a *Dillon* situation. Therefore, there is no reason to require physical injury or contemporaneous awareness under the *Dillon* approach and not under the *Molien* approach. If the likelihood of distress experienced by the direct victim is equal to that of the *Dillon* bystander, then the bystander should be allowed to recover, despite the lack of physical injury or contemporaneous sensory perception.

C. Ochoa*'s Effect on Prior Case Law*

Ochoa presented an ideal opportunity to clarify and redefine these three inconsistencies in the case law of mental distress. Instead, the California Supreme Court sidestepped the issues.

The *Ochoa* court ignored the "contemporaneous" issue by holding that an observation of the defendant's conduct and of the child's injury and a contemporaneous awareness of the cause of the injury were sufficient.[130] The court did not address whether the observation of the act and the injury must be contemporaneous or what "contemporaneous" means. The court merely required that the plaintiff have a contempor-

---

[123] *Id.* at 923, 616 P.2d at 816, 167 Cal. Rptr. at 835.
[124] *Id.*
[125] *Id.* at 928, 616 P.2d at 821, 167 Cal. Rptr. at 838.
[126] *Id.*
[127] *Id.* at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838.
[128] 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984).
[129] *Id.* at 605, 208 Cal. Rptr. at 901.
[130] 39 Cal. 3d at 170, 703 P.2d at 8, 216 Cal. Rptr. at 668.

aneous knowledge of the source of the injury. The court did not clarify whether the plaintiff must know of the source of the injury at the time the injury is being inflicted. In *Ochoa*, the negligent conduct was allowing the victim's pneumonia to continue untreated. It is unlikely that the mother became aware that the defendant's failure to treat the child was the source of the child's injury while she observed his suffering. It is more likely that she recognized the cause of the injury subsequent to her realization of an injury. The court's requirement of a "contemporaneous awareness" of the cause of the injury is, therefore, unclear.

The *Ochoa* court also avoided defining "sensory perception of the injury-producing event." In *Ochoa*, the injury-producing event was the negligence of the doctor. It is unclear whether the plaintiff-parents actually witnessed his negligence. The doctor's negligence was his failure to treat his patient. It is unlikely that the mother actually witnessed this non-treatment. It is more likely that she became aware of it through her observations that the child did not become well. It may be argued that this is a sensory observation of only the injury and not the event. Thus, this case does not clarify what is required for sensory perception of the injury-producing event.

Finally, *Ochoa* deals directly with the third area of conflict — the inconsistencies between *Dillon* and *Molien*. *Ochoa* held that the plaintiffs did not have a cause of action under the *Molien* direct victim analysis, as the negligence of the doctor was directed at the boy, not the parents.[131] If the doctor's negligence was a lack of attention, then certainly he ignored the mother's attempt to get medical attention. If he ignored the son, he ignored the mother. Furthermore, the court overlooked the inconsistencies between the two approaches. The differences between *Molien* and *Dillon* regarding the physical injury and sensory perception requirements remain unresolved.

D. The Ochoa *Decision: Consistency or Conflict*

In addition to leaving conflicting case precedent unresolved, the *Ochoa* decision is internally inconsistent. One of the greatest concerns with the *Dillon* standards was that they are sometimes used arbitrarily, creating confusion and artificiality.[132] The *Ochoa* majority, after voicing this concern, appears to use these guidelines in exactly this manner. The court allowed the father to recover only for his distress from observing his son, and not for his distress from hearing his wife's reports.[133] The distress the father suffered from his wife's reports was no less real or

---

[131] *Id.* at 172-73, 703 P.2d at 10, 216 Cal. Rptr. at 670.

[132] *See id.* at 182, 703 P.2d at 17, 216 Cal. Rptr. at 676 (Bird, C.J., concurring and dissenting).

[133] *Id.* at 165 n.6, 703 P.2d at 5 n.6, 216 Cal. Rptr. at 665 n.6.

foreseeable than the distress he suffered from witnessing the child's condition himself. Thus, the court made an artificial distinction based on the source of the mental distress. This distinction was based upon the *Dillon* requirement that the shock be from a direct emotional impact caused by a sensory and contemporaneous observation. However, the court used the guideline in an artificial manner — not to limit the defendant's liability where it is not warranted, but rather to distinguish between compensable and non-compensable portions of the same injury.

Another question that arises is the court's use of "serious" mental distress. The majority stated that it would compensate the parents only for their distress resulting from the suffering they witnessed and not for the death of their child, which they did not observe.[134] If the child had not died, the Ochoas' distress probably would not have been serious enough to warrant recovery. A relative of a person who recovers despite medical inattention for two days would probably not suffer "serious mental distress."[135] Therefore, in reality, the court did one of two things. It either discarded the seriousness requirement of mental distress or it compensated the plaintiffs for their son's death. Actually, the court probably allowed recovery for distress suffered from the victim's unobserved death. This result directly conflicts with the *Dillon* requirement that observation is the basis for recovery and contradicts the court's reasoning for not allowing the father a full recovery.

E. The Ochoa *Case as Precedent*

Ochoa will have substantial and far-reaching effects as precedent for mental distress cases. First, *Ochoa* poses serious problems of application for future mental distress cases in *Dillon* jurisdictions. Second, *Ochoa* will deepen the division of opinion as to which is the most rational approach to mental distress claims.

Ochoa's immediate effects within *Dillon* jurisdictions will be twofold. First and most obviously, the case furthers the confusion and conflict in the case precedent. Thus, mental distress cases are likely to remain in a state of conflict for the present.

More importantly, *Ochoa* may have serious repercussions in the area of medical malpractice. *Ochoa* allowed recovery for mental distress caused by witnessing a loved one suffer from a doctor's negligence. Therefore,

---

[134]*See id.* at 167 n.7, 703 P.2d at 6 n.7, 216 Cal. Rptr. at 666 n.7.

[135]The courts have repeatedly emphasized that a "serious" mental disturbance requires more than being upset or having hurt feelings. A serious injury is one that is debilitating. *See, e.g.*, Paugh v. Hanks, 6 Ohio St. 3d 72, 78, 451 N.E.2d 759, 765 (1983). It is reasonable to assume that a "reasonable person normally constituted" would be able to endure some anxiety over a relative's brief stay in the hospital, without suffering debilitating mental injuries.

a claim for a bystander's mental distress for medical malpractice against another is now recognized. The addition of another cause of action in the medical malpractice area will increase the scope of damages that may be recovered. Considering the problems that large recoveries against the medical profession have raised, increasing the scope of damages may have negative consequences.[136]

Furthermore, *Ochoa* will strengthen the arguments of those opposed to the *Dillon* approach. *Dillon* critics fear the possibility of unlimited liability for mental distress.[137] Adding medical malpractice to the scope of mental distress recovery is a large step in the extension of liability. Critics may fear that once this step has been taken, there will be no principled basis on which to limit liability.[138]

Ochoa may also be used to further the argument that the *Dillon* standards are too mechanical.[139] Other courts are unlikely to adopt the *Dillon* approach unless it can be proven that its rules of liability are sufficiently generalizable to be applied with reasonable certainty to comparable factual situations.[140] *Ochoa* illustrates that such reasonable certainty of application has not been achieved. Therefore, *Ochoa* may serve as ammunition for jurisdictions that decline to adopt the *Dillon* foreseeability test.

IV. A Proposed Solution: A Flexible Standard of Duty and Higher Burden of Proof

Obviously, none of the alternatives to the negligent infliction of emotional distress is without fault. A rational approach to the problem would be to consider the most important objectives to be attained and tailor the solution to meet those objectives.

Most, if not all, of the arguments proposed in favor of the various theories support one of two overriding policies. The first is that any

---

[136]Increasing medical malpractice awards will raise the already skyrocketing costs of medical malpractice insurance. Such costs are passed on to consumers, who pay higher medical bills. Peterson & Priest, *The Civil Jury* 34 (Rand Corp. Doc. No. R 2881-ICJ, 1982). In some areas of practice, the high cost of insurance or its unavailability has caused a scarcity of doctors. *Id.*

[137]Corso v. Merrill, 119 N.H. 647, 660-61, 406 A.2d 300, 309 (1979) (Grimes, J., dissenting) ("Accidents are often caused not by reprehensible conduct, but by momentary inadvertence or judgment which after the fact is found to have been faulty . . . . [T]he court's new rule can cause the dominoes to start falling subjecting the person to suits . . . by all manner of relatives whose 'mental tranquility' is claimed to have been upset . . . . [T]he genie is now clearly out of the bottle . . . .")

[138]*E.g., id.*

[139]*See, e.g., Ochoa*, 39 Cal. 3d at 182, 703 P.2d at 17, 216 Cal. Rptr. at 676 (Bird, C.J., concurring and dissenting).

[140]*See* D'Ambra v. United States, 114 R.I. 643, 664, 338 A.2d 524, 536 (1975) (Joslin, J., dissenting).

rule imposing liability must not be arbitrary or capricious, yet must be flexible and broad enough to be applied to various factual situations with reasonable certainty.[141] The second goal is an equitable method of avoiding unwarranted liability without unduly restricting recovery where deserved.[142]

A flexible standard of liability, coupled with an increased burden of proof, would be the most effective approach to the negligent infliction of mental distress. By leaving the substantive law flexible to meet unpredictable factual situations and increasing the burden of proof to eliminate unwarranted liability, most of the criticisms to the various approaches to mental distress can be overcome.

Flexible liability standards require flexible duty standards because duty is the key to liability in negligence actions.[143] A flexible standard of duty is one that is based upon foreseeability.[144] Foreseeability as the basis of duty would allow flexibility of recovery without the use of mechanistic or rigid rules.[145] Foreseeability can be a general principle applicable to a variety of factual situations.[146]

In order to avoid problems with the interpretation of *what* must be foreseeable, the *Dillon* standards may be generalized on a simple level. The *Dillon* guidelines require that the plaintiff be a close friend or relative who was near the scene of the accident and who witnessed the accident.[147] These guidelines may be generalized to the concept that the plaintiff and the mental injury be foreseeable. The plaintiff must prove that the defendant could reasonably expect this injury to occur to this person, given the circumstances of the case. In other words, liability should be imposed if the defendant could reasonably foresee this type of liability as a result of his actions.

This approach to liability has many positive aspects. The concept of duty in mental distress cases will conform to other areas of negligence.[148] A flexible approach to duty avoids the criticisms that plague the impact rule and zone of danger rule because the foreseeability approach is a general principle that avoids mechanistic rules. Liability should be imposed if the plaintiff and his injury were foreseeable.

The greatest disadvantage of a flexible standard of duty is the fear of unlimited liability, fraud, and lack of proof of injury and causation.

---

[141]*See, e.g.*, Stadler v. Cross, 295 N.W.2d 552, 554 (Minn. 1980); *D'Ambra*, 114 R.I. at 664, 338 A.2d at 536 (Joslin, J., dissenting).

[142]*See, e.g.*, *Dillon*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72.

[143]*See, e.g.*, PROSSER & KEETON, *supra* note 1, § 54 at 356.

[144]*See supra* note 66 and accompanying text.

[145]*See Ochoa*, 39 Cal. 3d at 191, 703 P.2d at 23, 216 Cal. Rptr. at 683 (Bird, C.J., concurring and dissenting).

[146]*Id.*

[147]*Dillon*, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[148]*See* Leong v. Takasaki, 55 Hawaii 398, 407, 520 P.2d 758, 764 (1974).

All three of these concerns may be eliminated by raising the burden of proof to that of "clear and convincing evidence."

In a civil trial, the normal burden of proof is a preponderance of the evidence.[149] This standard serves three functions. First, the low burden allows dispute resolution with reasonable dispatch and finality.[150] Second, there is no substantial reason to burden one party greatly.[151] Finally, the burden of proof deters frivolous actions only in cases where the evidence is in equipoise.[152]

Raising the burden of proof to that of "clear and convincing evidence"[153] would dispose of any criticisms of a flexible-duty approach and promote the goal of limiting unwarranted liability. Furthermore, an increased burden of proof in mental distress claims would be consistent with the rationales for imposing a lower burden in most civil cases. Finally, an increase in the burden of proof would be consistent with case law where the state of mind is the factual issue to be proven.[154]

A standard of clear and convincing evidence should erase most of the criticisms surrounding the flexible duty approach. To dispel the fear of unsubstantiated claims of mental distress, this burden would force the plaintiff to bring forth substantial evidence that he had, in fact, been seriously injured and that such injury was caused, in fact, by the defendant's negligent conduct.[155] A higher burden of proof would allow recovery in those cases where it is most deserved and inhibit litigation of claims that are less well-founded.

An increased burden would also tend to deter frivolous mental distress claims. For example, a plaintiff who witnessed the traumatic death of a loved one would probably be able to convince the jury that he had, in fact, suffered injury, given an appropriate amount of medical evidence. A plaintiff who suffered a mental injury because of property damage, however, would not be able to meet the burden so easily. Such a plaintiff would find the jury more skeptical of his claim. Furthermore, this plaintiff would have a great deal more trouble producing the required quantum of medical evidence. The plaintiff who indeed suffered a devastating

---

[149]McCormick, On Evidence § 339 (3d ed. E.W. Cleary 1972).

[150]Winter, *The Jury and the Risk of Non Persuasion*, 5 Law & Soc. Rev. 335, 336 (1975).

[151]*Id.* at 337.

[152]*Id.*

[153]The standard of clear and convincing evidence has been defined as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings. State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979).

[154]*See infra* notes 158-59 and accompanying text.

[155]A lack of proof regarding both injury and causation was a rationale supporting the impact rule. *See supra* notes 13-17 and accompanying text.

injury from an unusual source, however, would not be automatically precluded from asserting his claim. He would still have an opportunity to put forth evidence that the injury did occur and to let the jury weigh the evidence in view of the burden he must carry.

Increasing the burden of proof would also be consistent with the rationales for maintaining a lower burden in most civil cases. An increase in the burden will not materially slow the litigation process.[156] The change would only force the plaintiff to produce a greater quantum of *convincing* evidence.[157]

However, the most important reason for increasing the burden of proof in mental distress cases is that mental injury is peculiarly within the knowledge of the plaintiff. This fact puts the defendant at a substantial evidentiary disadvantage. Courts have feared compensating for mental distress because of the potential for fraudulent claims.[158] The burden of proof is often raised when there is a special danger of deception.[159] Therefore, there is a substantial reason for burdening one party more than the other.

Finally, there is a real need to deter frivolous actions in cases where the evidence appears on the surface to be just beyond equipoise.[160] The potential for fraud and deception in mental distress cases is an ever-present factor.[161] Therefore, all but the most convincing cases of mental distress should be deterred.

A standard of clear and convincing evidence in mental distress cases would conform to the burden of proof used in many civil cases where the issue to be proved is one's state of mind. For example, malice must be proved by clear and convincing evidence.[162] More importantly, mental illness must usually be proved by clear and convincing evidence.[163] While this issue normally arises in litigation surrounding commitment proceedings, the rationale applies as well to claims of mental distress. If the issue to be proven is objective, the burden of a preponderance of the evidence may be used. If such a determination is subjective, however, a standard of clear and convincing evidence must be met.[164] Because mental illness is not objective, it stands to reason that it should be subject

---

[156]*See supra* note 150 and accompanying text.

[157]*Addington*, 588 S.W.2d at 570.

[158]*E.g.*, Towns v. Anderson, 195 Colo. 517, 519, 579 P.2d 1163, 1164 (1978).

[159]*See* McCormick, *supra* note 149, at § 340.

[160]*See supra* note 152 and accompanying text.

[161]*See Towns*, 195 Colo. at 519, 579 P.2d at 1164.

[162]*E.g.*, DiLeo v. Koltnow, 200 Colo. 119, 613 P.2d 318 (1980).

[163]*E.g.*, *In re* Johnston, 118 Ill. App. 3d 214, 454 N.E.2d 840 (1983); Fletcher v. Fletcher, 60 Or. App. 623, 654 P.2d 1121 (1982).

[164]*See, e.g.*, Maine Human Rights Comm'n v. City of Auburn, 425 A.2d 990, 997 (Me. 1981) (question of intentional sex discrimination in hiring practices).

to a higher burden of proof. Therefore, an increased burden of proof for mental distress cases would be both appropriate and in accordance with analogous case law.

V. Conclusion

While the modern trend of legal thought favors more expansive approaches to liability for mental distress, many problems with the *Dillon* and pure foreseeability tests are still unresolved. *Ochoa* is a prime example of the conflict and confusion that have evolved from the application of *Dillon* to factually dissimilar situations. The *Ochoa* court ignored the conflicts in prior case law and concentrated on one specific factual scenario. It left a host of unanswered questions about the application of the *Dillon* guidelines and the future viability of the *Dillon* mental distress theory.

By combining a general foreseeability test for duty with a burden of proof of "clear and convincing" evidence, the two goals of flexibility and limiting unwarranted liability may be attained. Such an approach will overcome many of the criticisms of the more expansive approaches and avoid the problems associated with an *Ochoa* situation.

Nana Quay-Smith

The Psychotherapist-Patient Privilege: Are Patients Victims in the Investigation of Medicaid Fraud?

I. Introduction

To discourage abuse of the Medicaid system of public reimbursement for medical services rendered to indigents,[1] Congress has authorized the establishment of state Medicaid fraud control units.[2] One function of these units is to investigate and prosecute providers of psychotherapeutic services, among others, for fraudulent billing practices.[3] Acting by authority of vague federal and state access-to-documentation requirements,[4] some units have requested extensive disclosure of psychotherapists' patient records, including notes and diagnoses, for investigative purposes.[5]

Therapists have sought to prevent this disclosure, invoking their patients' constitutional privacy rights and states' statutory physician-patient or psychotherapist-patient privileges. Courts have responded inconsistently, some declining to recognize any protection for patient records, others differing on the extent of constitutional or statutory protection available. The resulting uncertainty as to the bounds of the law may, as much as actual disclosure, detrimentally affect the treatment of emotional and mental disorders. To minimize any harm, mental health professionals need clear and consistent judicial definition of states' rights of access to documentation in Medicaid fraud investigations of psychotherapists.

This Note will examine psychotherapists' standing to defend their patients' confidentiality rights and the possibility of waiver of these rights

---

[1] H. R. Rep. No. 393(II), 95th Cong., 1st Sess. 79, *reprinted in* 1977 U.S. Code Cong. & Admin. News 3039, 3082.

[2] 42 U.S.C. § 1396b(q)(3) (1982).

[3] *Id.*

[4] *See, e.g.*, 42 U.S.C. § 1396(a)(27) (1982); 42 C.F.R. § 431.107(b) (1984); Mass. Admin. Code tit. 106, § 450.205(A) (1983).

[5] Psychotherapy has been defined as any mode of psychiatric treatment, including "uncovering, exploratory and reconstructive therapy, limited goal therapy, and psychoanalysis, its most intensive form." Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 184 n.35 (1960). The Advisory Committee on Federal Rules of Evidence, in a proposed but never codified provision for a psychotherapist-patient privilege, defined a psychotherapist as either:

> (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

56 F.R.D. 183, 240 (1972). The committee in its notes stated an intent to limit the definition strictly to medical doctors and licensed psychologists. *Id.* at 243. Social workers and other counselors "purporting to render psychotherapeutic aid" were excluded. *Id.*

by patients who sign a standard contractual Medicaid release. This Note will also suggest the appropriate scope of protection of records generated in the psychotherapist-patient relationship.

II. Background: Statutorily Permissible Access to Medicaid Providers' Documents

In 1965, Congress created the Medicaid program[6] to ensure the availability of medical assistance to low-income citizens who are age 65 or over, blind, disabled, or members of families with dependent children.[7] Medicaid plans are jointly financed by the federal and state governments and administered by the states.[8] To avail itself of matching federal Medicaid funds, each state must establish, within broad federal guidelines, procedures for the administration and operation of its own plan.[9]

One federal requirement is that of adequate documentation of services provided to Medicaid recipients.[10] A state must obtain from every provider[11] an agreement "(A) to keep such records *as are necessary fully to disclose* the extent of the services provided . . . and (B) to furnish the State agency or the Secretary [administering the plan] with *such information*, regarding any payments claimed by such [provider] . . . *as the State agency or the Secretary may* from time to time *request*."[12] With this nonspecific language,[13] the federal statute gives states seemingly unlimited discretion in determining the adequacy of documentation.[14]

Congress has mandated that the purposes for disclosure be "directly connected with the administration" of a state's Medicaid plan.[15] However,

---

[6]42 U.S.C. § 1396 (1982).

[7]42 C.F.R. § 430.0 (1985).

[8]*Id.*

[9]*Id.* Should the state plan not comply with the federal requirements and administrative guidelines, federal funds may be withheld. 45 C.F.R. § 201.6 (1984).

[10]42 U.S.C. § 1396a(a)(27) (1982).

[11]A provider is "an individual or entity which furnishes items or services for which payment is claimed under Medicaid." 42 C.F.R. § 455.300(a) (1985). Each state, within broad federal guidelines, determines the types and ranges of services for which it will permit Medicaid reimbursement. 42 C.F.R. § 430.0(a) (1985).

[12]42 U.S.C. § 1396(a)(27) (1982) (emphasis added).

[13]Courts have expressed frustration with the task of interpreting the Medicaid statute: "The Medicaid statute . . . is an aggravated assault on the English language, resistant to attempts to understand it. The statute is complicated and murky, not only difficult to administer and to interpret, but a poor example to those who would like to use plain and simple expressions." Friedman v. Berger, 409 F. Supp. 1225, 1225-26 (S.D.N.Y. 1976).

[14]Ohio v. Collins (*In Re* Madeline Marie Nursing Homes), 694 F.2d 433, 447 (6th Cir. 1982); Commonwealth v. Kobrin, 395 Mass. 284, 290, 479 N.E.2d 674, 679 (1985). The Sixth Circuit Court of Appeals noted that a state's documentation requirements are limited in that they may not be arbitrary or capricious or deprive a provider of due process. *Madeline Marie*, 694 F.2d at 447.

[15]42 C.F.R. § 431.301 (1985).

this limitation does not protect the records of a provider subjected to a Medicaid fraud investigation. Congress has specified that a state may require disclosure for the purpose of "[c]onducting or assisting an investigation, prosecution, or civil or criminal proceeding related to the administration of the plan."[16]

To discourage provider abuse of the Medicaid program, Congress, in 1978, authorized the establishment of state Medicaid fraud control units, empowered to investigate and prosecute all aspects of fraud in connection with the Medicaid program.[17] These units, should they deem a provider's records useful in an investigation, have the same statutory rights of access as state agencies.[18] Thirty-six states have established Medicaid fraud control units in the offices of their attorneys general.[19] Armed with experience and increased sophistication, these units are now investigating psychotherapists' alleged misconduct,[20] creating a need for precise definition of governmental and individual rights as to disclosure of potentially sensitive and highly personal records of patient treatments.

III. Grounds for Protection of Patients' Interests

A. Standing

Generally, to establish standing to litigate a claim, a party must demonstrate a "personal stake" in the outcome of the case.[21] To establish this stake, the party must show, first, a distinct injury to himself and, second, a causal connection between that injury and the action being litigated.[22]

Given this rule, it would seem that patients, as the potential injured parties, must themselves litigate the question of confidentiality rights; therapists, who claim no personal abrogation of rights, should not have standing to assert the privacy rights of other individuals. However, state and federal courts have demonstrated a willingness to recognize psychotherapists' standing to protect their patients' confidentiality interests during fraud investigations.[23]

---

[16]42 C.F.R. § 431.302 (1985).

[17]42 U.S.C. § 1396(q)(3) (1982).

[18]42 C.F.R. § 455.21(a)(2)(iii) (1984).

[19]Fisher, *Confidentiality is a Casualty in War on Medical Fraud*, Am. Psychological A. Monitor, June, 1985, at 40, col. 2.

[20]*Id.* at col. 1.

[21]Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978).

[22]*Id.*

[23]*See In re* Zuniga, 714 F.2d 632, 641 n.8 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983); Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1037 (D. Hawaii 1979); Chidester v. Needles, 353 N.W.2d 849, 851 (Iowa 1984); Commonwealth v. Kobrin, 395 Mass. 284, 287 n.8, 479 N.E.2d 674, 677 n.8 (1985).

In *Chidester v. Needles*,[24] the Supreme Court of Iowa sidestepped the potential standing problem. In that case, involving investigation of a clinic providing psychological services to Medicaid recipients, the court noted that the state had failed to challenge the doctors' rights to raise the issues of patient privilege and rights of privacy.[25] In the absence of that contention, the court explicitly declined to address the issue of standing.[26]

In *In re Zuniga*,[27] the Sixth Circuit Court of Appeals recognized two psychiatrists' standing to assert their patients' rights against disclosure in an insurance fraud investigation.[28] Though it did not explain its decision, the court apparently relied on case law[29] and the proposed, but never codified, Rule 504(c) of the Federal Rules of Evidence.[30] Proposed Rule 504(c), a psychotherapist-patient privilege rule, recognized a therapist's right to claim protection of communications on a patient's behalf.[31] Promulgated by the United States Supreme Court, Rule 504 was criticized for excluding all but psychotherapists from the traditional doctor-patient privilege.[32] Rule 504 and all seven other proposed privilege rules were ultimately replaced by one uncontroversial, open-ended rule, to facilitate passage of the entire rules package.[33] Still, Rule 504 is a significant indication of the high court's preference in issues involving the psychotherapist-patient privilege. As such, the rule should carry substantial weight when courts consider therapists' standing to assert their patients' rights.

---

[24]353 N.W.2d 849 (Iowa 1984).

[25]*Id.* at 851.

[26]*Id.*

[27]14 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

[28]*Id.* at 641 n.8.

[29]*Id.*

[30]*Id.* at 636-37.

[31]56 F.R.D. 183, 241 (1972). Rule 504 read, in part, "The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary." *Id.*

[32]S. REP. No. 1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7053.

[33]*Id.* The proposed privilege rules were replaced by Rule 501, which reads:

> Except as otherwise required by the Constitution of the United States as provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

The United States District Court for the District of Hawaii, in *Hawaii Psychiatric Society v. Ariyoshi*,[34] took a more pragmatic approach to the issue of standing. In that case, plaintiffs Virgil Willis, Jr., a psychologist, and the Hawaii Psychiatric Society sought to enjoin the enforcement of a state statute permitting administrative searches of Medicaid providers' offices and records.[35] The court reasoned that disclosure of therapy records and files materially affects the rights of Medicaid beneficiaries.[36] It further recognized that Medicaid recipients might have no effective means to prevent violation of those rights in that patients might not know of a violation until after the information has been divulged and the damage done.[37] By comparison, psychotherapists have both the opportunity and the incentive to protect recipient-patients with whom they have developed a professional relationship.[38] Therefore, the court concluded, therapists should logically be recognized as having standing to assert their patients' rights.[39]

B. The Right of Privacy as Protection Against Disclosure

The constitutional right of privacy was first recognized by the Supreme Court of the United States in 1965.[40] In 1972, the Court defined it as the individual's right to make certain fundamental decisions free from governmental compulsion[41] and later described it as a fourteenth amendment right tied to a "concept of personal liberty and restrictions upon state action . . . ."[42]

---

[34]481 F. Supp. 1028 (D. Hawaii 1979).

[35]*Id.* at 1035.

[36]*Id.* at 1037.

[37]*Id.*

[38]*Id.*

[39]*Id.*; *see also* Barrows v. Jackson, 346 U.S. 249, 257 (1953) (white property owner permitted to raise black purchaser's rights); Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972) (physician convicted of providing contraceptives permitted to raise recipients' rights in defense). The court in *Hawaii Psychiatric Society* considered only a physician's standing to assert a patient's constitutional right of privacy. 481 F. Supp. at 1037. In *Commonwealth v. Kobrin*, another Medicaid fraud investigation case, the Supreme Judicial Court of Massachusetts invoked the *Hawaii Psychiatric Society* rationale to determine that a psychiatrist had standing to assert his patients' statutory psychotherapist-patient privilege. *Kobrin*, 395 Mass. at 287 n.8, 479 N.E.2d at 677 n.8.

[40]Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[41]Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[42]Roe v. Wade, 410 U.S. 113, 153 (1973). In the context of psychotherapy, the right has been defined as:

> no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others. The right to privacy is, therefore, a positive claim

The Supreme Court has recognized two conceptual strands to the still embryonic right of privacy.[43] The first is the individual's interest in autonomy — independence in making certain kinds of important decisions.[44] The second is his interest in confidentiality — avoidance of disclosure of personal matters.[45] A patient's interest in protecting psychotherapeutic records falls within either of these privacy strands.

The first, the right of autonomy, includes freedom to make decisions pertaining to psychiatric care "without unjustified governmental interference."[46] The decisions to seek help from a psychiatrist or psychologist and to share openly one's thoughts and experiences with a therapist lie within a "cluster of constitutionally protected choices."[47] If a patient fears public disclosure of the highly personal information often revealed in psychotherapy, he might feel compelled to be less candid with his therapist[48] or to shun treatment altogether.[49] Thus, governmentally compelled exposure might negatively affect a patient's right to choose a course of action.[50]

Governmental interference with these vital decisions can also affect a patient's other fundamental rights. By discouraging effective treatment, the government hinders an individual's cognition, thought, and decision-making processes.[51] The resulting emotional imbalance may interfere with a person's rights in marriage and family life, as well as the freedoms of religion, speech, and the press.[52] Governmentally compelled release

---

> to a status of personal dignity — a claim for freedom, if you will, but freedom of a very special kind.

Lora v. Board of Educ., 74 F.R.D. 565, 571 (E.D.N.Y. 1977) (quoting Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1188-89 (1965)).

[43]Whalen v. Roe, 429 U.S. 589, 598-600 (1977).

[44]*Id.* at 599.

[45]*Id.* at 599-600.

[46]Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1039 (D. Hawaii 1979); *see also* Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976) (Hufstedler, J., dissenting in part), *cert. denied*, 430 U.S. 954 (1977).

[47]*Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1038 (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)). The court noted psychotherapeutic confidences often pertain to areas already recognized as constitutionally protected, listing family, marriage, parenthood and sexuality as examples. *Id.*

[48]Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 24-25 (1980).

> As patients become less open in psychotherapy, the therapist has less information with which to assist the patient. In fact, the ideas, fantasies, and fears that a patient may be least likely to disclose without the assurance of confidentiality may be among the most important to communicate to the therapist.

Id. at 25.

[49]*Id.* at 24.

[50]*Id.*

[51]*Id.* at 22.

[52]*Id.*

of records of a patient's psychotherapeutic treatment clearly intrudes on the individual's right of autonomy.

Such a release may even more clearly intrude on the second strand of the privacy right — the right to keep personal matters confidential. Public disclosure of "the most intimate and embarrassing details of a patient's life . . . may well strip him of much of his own sense of dignity."[53] Exposure of intensely personal confidences, observations and diagnoses causes "a loss of the power individuals treasure to reveal or conceal their personality or their emotions as they see fit, from intimacy to solitude."[54]

However, the Supreme Court has recognized that disclosure of potentially harmful or unfavorable medical information is at times necessary to the functioning of the modern medical system.[55] Because insurance companies and public health agencies must work with a certain amount of private data,[56] limited governmental intrusion into the protected zones of privacy is permissible when properly justified.[57]

To determine the justifiability of an abrogation of a therapy patient's privacy rights, courts must balance the state interests served by disclosure with the intrusion into a patient's privacy.[58] This amorphous balancing test gives courts freedom rationally to reach a conclusion at either end of the privacy spectrum.

One can argue that the Supreme Court has recognized a compelling state interest in acquiring all relevant evidence to ensure the fair administration of justice.[59] Medicaid fraud investigations are instigated to bring to justice providers criminally misappropriating taxpayers' dollars for personal gain.[60] Because individual privacy rights must yield to a compelling state interest in fair, thorough investigations, therapists' patient

---

[53]*Lora*, 74 F.R.D. at 571.

[54]McKenna v. Fargo, 451 F. Supp. 1355, 1381 (D.N.J. 1978).

[55]*Whalen*, 429 U.S. at 602.

[56]*Id.*

[57]*Caesar*, 542 F.2d at 1067.

[58]*Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1043. The U.S. District Court for the District of Hawaii applied a "compelling state interest" test in determining the allowable level of intrusion under the autonomy strand and a balancing test under the confidentiality strand. *Id.* Other courts, less exacting but perhaps as effective in their analysis of privacy rights in psychotherapeutic relationships, have smudged the line between the two concepts and simply applied a balancing test to determine a general right against intrusion. *See* Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); Miller v. Colonial Refrigerated Transp., Inc., 81 F.R.D. 741 (M.D. Pa. 1979); Lora v. Board of Educ., 74 F.R.D. 565 (E.D.N.Y. 1977); People v. Stritzinger, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983).

[59]United States v. Nixon, 418 U.S. 683, 709 (1974); Branzburg v. Hayes, 408 U.S. 665, 695-701 (1972).

[60]Camperlengo v. Blum, 56 N.Y.2d 251, 255, 436 N.E.2d 1299, 1301, 451 N.Y.S.2d 697, 699 (1982).

files, containing information possibly vital to the administration of criminal justice, should be disclosed.[61]

This dogmatic approach, in effect, emasculates the right of privacy.[62] It does not appear to be an approach the Supreme Court would endorse. Rather, the Court would probably consider a number of relevant factors in order to balance the state's interests with the individual's privacy concerns, as it did in *Whalen v. Roe*.[63] The appellants in *Whalen* sought to enjoin the enforcement of a New York statute establishing a centralized computer file of the names and addresses of persons who had purchased, by prescription, drugs which, though legal, had a substantial potential for abuse, for example, opium, cocaine, or amphetamines.[64] Appellants, patients legally purchasing the drugs, feared a centralized record would discourage legal use of the medicines by creating user fears of stigmatization as addicts.[65]

The Court considered several factors in balancing the state's interest in disclosure versus the plaintiffs' privacy interests. Because of the limited disclosure sought, the adequacy of safeguards to prevent unauthorized disclosure, the state's demonstrated need for the records, and the lack of potential harm to the patient or to his relationship with his physician, the balance swung in favor of the state.[66]

In psychotherapist-patient cases, lower courts have applied similar factors:[67] (1) the extent to which the scope of the information requested has been limited to minimize any intrusion or risk of psychological harm;[68] (2) the safeguards established to ensure continued confidentiality

---

[61]Chidester v. Needles, 353 N.W.2d 849, 853 (Iowa 1984).

[62]*Smith*, *supra* note 48, at 34.

[63]429 U.S. 589 (1977).

[64]*Id.* at 590-93.

[65]*Id.* at 595-96.

[66]*Id.* at 596-604.

[67]*See* Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977) (psychiatrist required to testify when former patient has placed her emotional health in issue, waived her privilege, and given psychiatrist permission to testify); Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028 (D. Hawaii 1979) (state enjoined from enforcing its administrative statute authorizing searches of Medicaid providers' offices and records); Lora v. Board of Educ., 74 F.R.D. 565 (E.D.N.Y. 1977) (randomly selected records of anonymous emotionally handicapped school children may be disclosed to determine validity of racial discrimination charges); Commonwealth v. Kobrin, 395 Mass. 284, 479 N.E.2d 674 (1985) (disclosure of psychotherapist's records limited for purpose of Medicaid fraud investigation).

[68]*Caesar*, 542 F.2d at 1069; *Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1039; *Lora*, 74 F.R.D. at 579. The District Court of Hawaii noted that even disclosure only to government personnel may be too harmful to warrant instrusion because the records might contain highly personal communications or descriptions of embarrassing or illegal conduct. *Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1041.

of and limited access to the material sought;[69] and (3) the necessity (as opposed to desirability) to the litigation of the information gained by contested means.[70] In cases involving psychotherapy records, great weight should be given to patients' privacy rights because of the highly sensitive nature of the data sought.[71] As the sensitivity of the information increases, so should the state's burden to justify an intrusion.[72]

C. *The Psychotherapist-Patient Privilege as Protection*

The psychotherapist-patient privilege, an exception to the rule that courts must receive all evidence in a judicial proceeding,[73] is an outgrowth of the physician-patient privilege.[74] A majority of states have physician-patient privilege statutes similar to the act first passed in New York in 1828,[75] but those statutes offer little protection to psychotherapists. So many exceptions have been created to permit disclosure of medical information, whether in the public interest or to prevent fraud, that the privilege is now virtually useless.[76]

The psychotherapist-patient privilege, in contrast, has received broad support within the legal community. It has been incorporated into a

---

[69]*Lora*, 74 F.R.D. at 579; *Kobrin*, 395 Mass. at 294-95, 479 N.E.2d at 681. The Supreme Judicial Court of Massachusetts established innovative safeguards, providing for *in camera* inspection of the records, and detailing the types of data which could be disclosed and those types which could not. *Id.* For a full discussion of the Kobrin decision, *see infra* notes 147-62 and accompanying text.

[70]*Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1045; *Lora*, 74 F.R.D. at 579; *Kobrin*, 395 Mass. at 292, 479 N.E.2d at 680. The District Court of Hawaii determined that details of patients' problems are not necessary to ascertain whether a psychiatrist is rendering services at the times and for the amounts claimed. *Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1042.

[71]*Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1043.

[72]*Id.*

[73]8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (1983).

[74]Comment, *Evidence: The Psychotherapist-Patient Privilege Under Federal Rule of Evidence 501*, 23 WASHBURN L.J. 706, 707 (1984).

[75]The current New York statute provides that:

> Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing or dentistry shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation . . . a professional service corporation . . . and the patients to whom they respectively render professional medical services.

N.Y. CIV. PRAC. LAW § 4504 (McKinney Supp. 1984). *See, e.g.*, N.C. GEN. STAT. § 8-53 (Supp. 1981); OHIO REV. CODE ANN. § 2317.02(B) (Page Supp. 1985); OR. REV. STAT. § 40.235 (1983); 42 PA. CONS. STAT. ANN. § 5929 (Purdon 1983); UTAH CODE ANN. § 78-24-8 (Supp. 1985); *see also* Comment, *supra* note 74, at 708.

[76]56 F.R.D. 183, 241 (1970).

majority of state codes[77] and was included in the 1972 proposed Rules of Evidence approved by the Supreme Court[78] — rules from which a physician-patient privilege was notably absent.[79]

Proposed Rule 504 of the Federal Rules of Evidence defined the psychotherapist-patient privilege as an individual's right to "refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of

---

[77]*See, e.g.*, ALA. CODE § 34-26-2 (1985) (Psychiatrist and psychologist-patient privilege); ALASKA STAT. § 08.86.200 (1982) (Psychologist); ARIZ. REV. STAT. ANN. § 32-2085 (Supp. 1985) (Psychologist); ARK. STAT. ANN. § 28-1001: Rule 503 (1979) (Psychotherapist); CAL. EVID. CODE §§ 1010 *et. seq.* (West Supp. 1986) (Psychotherapist); COLO. REV. STAT. § 12-43-120 (1985) (Psychologist); COLO. REV. STAT. § 13-90-107(1)(g) (Supp. 1985) (Psychologist); CONN. GEN. STAT. ANN. § 52-146d *et. seq.* (West Supp. 1985) (Psychiatrist); DEL. CODE ANN. UNIF. RULES OF EVID., RULE 503 (Supp. 1984) (Psychotherapist); FLA. STAT. ANN. § 90.503 (West 1979) (Psychotherapist); GA. CODE ANN. § 38-418 (Supp. 1982) (Psychiatrist); GA. CODE ANN. § 84-3118 (Harrison Supp. 1982) (Psychologist); HAWAII REV. STAT. § 626-1, RULE 504.1 (Psychologist); IDAHO CODE § 54-2314 (1979) (Psychologist); ILL. ANN. STAT. ch. 111, § 5306 (Smith-Hurd Supp. 1985) (Psychologist); IND. CODE ANN. § 25-33-1-17 (West Supp. 1985) (Psychologist); KY. REV. STAT. § 421.215 (1971) (Psychiatrist); KY. REV. STAT. § 319.111 (1983) (Psychologist); ME. R. EVID. 503 (1985) (Psychotherapist); MD. CTS. & JUD. PROC. CODE ANN. § 9-109 (1984) (Psychiatrist and psychologist); MASS. GEN. LAWS ANN. ch. 233, § 20B (West 1986) (Psychotherapist); MICH. COMP. LAWS ANN. § 330.1750 (West Supp. 1985) (Psychiatrist and psychologist); MINN. STAT. ANN. § 595.02(g) (West Supp. 1986) (Psychologist); MISS. CODE ANN. § 73-31-29 (1972) (Paychologist); MO. ANN. STAT. § 337.055 (Vernon Supp. 1985) (Psychologist); MONT. CODE ANN. § 26-1-807 (1985) (Psychologist); N.H. REV. STAT. ANN. § 330-A: 19 (1984) (Psychologist); N.J. STAT. ANN. § 45: 14B-28 (Supp. 1985) (Psychologist); N.M. STAT. ANN. § 61-9-18 (Supp. 1984) (Psychologist); N.M. R. EVID. 504 (1983) (Psychotherapist); N.Y. CIV. PRAC. LAW § 4507 (McKinney Supp. 1984) (Psychologist); N.C. GEN. STAT. § 8-53.3 (1985) (Psychologist); OHIO REV. CODE ANN. § 4732.19 (Page Supp. 1985) (Psychologist); OR. REV. STAT. § 40.230 (1983) (Psychotherapist); 42 PA. CONS. STAT. ANN. § 5944 (Purdon 1982) (Psychologist); TENN. CODE ANN. § 63-11-213 (1982) (Psychologist); TENN. CODE ANN. § 24-1-107 (1980) (Psychiatrist); UTAH CODE ANN. § 58-25-8 (Supp. 1985) (Psychologist); VA. CODE § 8.01-400.2 (1984) (Psychologist); WASH. REV. CODE ANN. § 18.83.110 (1978) (Psychologist); WYO. STAT. § 33-27-103 (1977) (Psychologist). The following states have incorporated a therapist-patient privilege into other privilege statutes: IOWA CODE ANN. § 622.10 (West Supp. 1985); LA. REV. STAT. ANN. § 13:3734 (West Supp. 1985); NEV. REV. STAT. § 49.215 (1985); N.D. RULE EVID. 503 (Supp. 1985); OKLA. STAT. ANN. tit. 12, § 2503 (West Supp. 1985); S.D. CODIFIED LAWS ANN. § 19-13-7 (1979); VT. RULE EVID. 503 (1983); WIS. STAT. ANN. § 905.04 (West Supp. 1985); *see also* D.C. CODE ANN. § 14-307 (1981). These statutes may not afford as much protection for therapist-patient records as would a separate privilege. For example, in Miller v. Colonial Refrigerated Transp., Inc., 81 F.R.D. 741 (M.D. Pa. 1979), the district court found a *psychiatrist* seeking protection of his patient records did not fall within the ambit of the state's *psychologist*-patient privilege. *Id.* at 744. Rather, the medical therapist was forced to seek relief under the state's physician-patient privilege statute, which prohibited disclosure of communications "which shall tend to blacken the character of the patient . . . ." That phrase had been interpreted in a 1925 decision to refer to a "loathsome disease." Because mental health problems were not such a "disease," the psychiatrist's records, unlike a psychologist's, were not protected. *Id.* at 743.

his mental or emotional condition . . . ."[80] Except for three circumstances — when examination was ordered by a judge, when communications were relevant to a condition that was an element of a claim or defense, or in proceedings for hospitalization[81] — the privilege was to be inviolate as to "legally coerced disclosure."[82]

Because this tightly constructed federal privilege was not codified,[83] therapists and their patients must rely on federal case law[84] and judicial interpretation of varying state statutes[85] for protection of confidences.

D. Patients' Waiver of Protection

Psychotherapist-patient confidences are protected to encourage the development and continuation of a relationship deemed highly beneficial to society.[86] However, patients may waive their protective rights or privileges, either by voluntary disclosure or consent to disclose.[87]

---

[78]56 F.R.D. at 240.

[79]*See id.* at 241-42. The psychotherapist-patient privilege, unlike the physician-patient privilege, meets all four of Wigmore's criteria for justification of an evidentiary exception: (1) that communications originate in confidence that they will not be revealed; (2) that confidentiality is essential to the relationship; (3) that the relationship should be fostered; and (4) that potential injury is greater than the benefit gained by disclosure. 8 J. WIGMORE, *supra* note 73, at § 2285.

[80]56 F.R.D. at 241.

[81]*Id.*

[82]*Id.* at 244.

[83]Congress expressed concern not that the proposed privileges were too liberal, but that they were unacceptably constrictive, providing for only a "partial doctor-patient privilege," a narrowed husband-wife privilege, and no newsreporter's privilege whatsoever. S. Rep. No. 1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7053. *But see* United States v. Witt, 542 F. Supp. 696, 698 (S.D.N.Y.), *aff'd*, 697 F.2d 301 (2d Cir. 1982), in which the federal district court took notice that Congress had "expressly refused" to endorse a psychotherapist-patient privilege. This would appear to be a convenient misreading of congressional intent in substituting Rule 501, for the purpose of reaching a desirable decision in a specific case.

[84]*See In re* Zuniga, 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983); *In re* Pebsworth, 705 F.2d 261 (7th Cir. 1983); *In re* Doe, 97 F.R.D. 640 (S.D.N.Y. 1982); Lora v. Board of Educ., 74 F.R.D. 565 (E.D.N.Y. 1977); United States *ex rel* Edney v. Smith, 425 F. Supp. 1038 (E.D.N.Y. 1976). All of the above cases recognize a federal common law privilege. *But see* United States v. Witt, 542 F. Supp. 696 (S.D.N.Y.), *aff'd*, 697 F.2d 301 (2d Cir. 1982); Felber v. Foote, 321 F. Supp. 85 (D. Conn. 1970).

[85]*See supra* note 77 for state psychotherapist-patient privilege statutes.

[86]56 F.R.D. at 258; *In re* Zuniga, 714 F.2d 632, 638 (6th Cir. 1983), *cert. denied*, 464 U.S. 983 (1983); *see also* Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028 (D. Hawaii 1979).

[87]*In re* Zuniga, 714 F.2d at 640; *In re* Pebsworth, 705 F.2d 261, 262 (7th Cir. 1983); Henry v. Lewis, 102 A.D.2d 430, 435, 478 N.Y.S.2d 263, 268 (1984).

Under traditional waiver doctrines, disclosure of confidential communications to any third party constitutes waiver of one's rights to protection, regardless of purpose or circumstance.[88] This strict approach was applied to insurance billing investigations in *In re Zuniga*.[89] Two psychotherapists, claiming patient privileges, refused to deliver subpoenaed records of patients' names, appointment dates and session lengths.[90] The Sixth Circuit Court of Appeals ordered compliance, ruling that the patients had waived all rights to confidentiality by giving the data to their insurance carrier, a party outside the therapist-patient relationship.[91]

Similarly, the Seventh Circuit Court of Appeals, in *In re Pebsworth*,[92] permitted disclosure of a psychotherapist's patients' identities, appointment dates and, in some cases, diagnoses for an insurance fraud investigation.[93] The court determined that a patient's express authorization to disclose information to an insurer for reimbursement purposes was, in effect, an all-encompassing waiver of privilege.[94] It reasoned that a privilege exists only when a patient intends for the communication to be confidential,[95] implying that an insurance authorization demonstrates a lack of the requisite intent. It noted that, by submitting to reimbursement procedures, patients had already permitted "numerous employees in a large, anonymous corporation" to intrude on their privacy.[96] The court apparently did not recognize any patient right to choose to disclose information only to specific parties for a limited purpose.[97]

Despite their strict adherence to the traditional rule, both the *Zuniga* and the *Pebsworth* courts seemed unsure that the waiver doctrine could be applied consistently in cases involving psychotherapists' fraud.[98] Justice

---

[88] *In re* Pebsworth, 705 F.2d at 263.

[89] 714 F.2d 632.

[90] *Id.* at 640.

[91] *Id.*

[92] 705 F.2d 261.

[93] *Id.* at 262-64.

[94] *Id.* at 262.

[95] *Id.* at 263, *citing* Lora v. Board of Educ., 74 F.R.D. 565, 585 (E.D.N.Y. 1977).

[96] *In re* Pebsworth, 705 F.2d at 264.

[97] *Id.* at 263; *see also* McCormick, Evidence § 103 & n.3 (3d ed. 1984) (insurance policy authorization to disclose terminates privilege for all purposes, including court proceedings).

[98] *In re* Zuniga, 714 F.2d at 640-41; *In re* Pebsworth, 705 F.2d at 263.

> While we might well have decided differently if the information sought under the subpoena involved detailed psychological profiles of patients or substantive accounts of therapy sessions, it cannot be said that the subsequent disclosure of such fragmentary data as is involved here as part of the insurance company's legal duties in assisting a federal criminal investigation would be beyond the contemplation of the patients' waiver.

Id.

William P. Gray, in his *Pebsworth* concurrence, articulated valid causes for this uncertainty, asserting that "traditional waiver doctrines are inappropriate in the context of present-day medical insurance."[99] He reasoned that by easing the financial strain that might discourage one from seeking needed treatment, insurance plans, like physician-patient privileges, encourage the establishment of psychotherapist-patient relationships necessary for the protection of one's mental health.[100] Though a patient may, out of economic necessity, consent to disclosure to a medical insurer, it does not necessarily follow that he has voluntarily consented to disclosure for unrelated purposes, such as aiding a criminal investigation.[101]

Within the modern medical service structure, insurance carriers are accepted and at times indispensable parties to treatment processes. As such, they should be treated like nurses in a physician-patient relationship or secretaries and paralegals in an attorney-client relationship.[102] Insurers' knowledge of communications should not destroy the privilege of confidentiality.[103] An authorization to release data to determine benefits payable should be limited to the express terms of the provision.[104] Unless specifically stated, it should not run to an investigator of fraudulent claims.[105]

This analysis is particularly true in the case of Medicaid recipients' disclosure agreements. An indigent patient's signature on a release form should not be characterized as a knowing waiver of his interests in confidentiality.[106] As the United States District Court for the District of Hawaii stated in *Hawaii Psychiatric Society v. Ariyoshi*,[107] "It is far more likely that, if he reads the form at all, a patient would assume that the records would include only billing information and similar nonconfidential matters."[108] Even if a recipient fully understood the impli-

---

[99]*In re* Pebsworth, 705 F.2d at 264 (Gray, J., concurring).

[100]*Id.*

[101]*Id.*

[102]*Id.*

[103]*Id.*

[104]*Henry*, 102 A.D.2d at 435, 478 N.Y.S.2d at 268.

[105]*Id.*

[106]*Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1045. Because the Medicaid program is state administered and each state promulgates its own forms, Medicaid applicant releases vary from state to state. A release might read like the Indiana provision: "I agree to undergo any examinations necessary to establish my eligibility for financial and/or medical assistance. I authorize any physician, hospital, or other provider of care to release any medical information about me, if requested by the County Welfare Department." Application for Medical Assistance, State Form 1267R4/DPW Form 2 (Rev.3-84), prescribed by the Indiana Department of Public Welfare. The applicant must "X" a box next to this statement and eight other provisions to indicate understanding and agreement.

[107]481 F. Supp. 1028 (D. Hawaii 1979).

[108]*Id.* at 1045.

cations of the authorization, his waiver could not fairly be characterized as a voluntary waiver. For an indigent, the choice between a loss of confidentiality rights and a loss of health for lack of medical attention is in reality no choice at all. As the court in *Hawaii Psychiatric Society* determined, neither a patient's nor a therapist's participation in the Medicaid program or agreement to make records available is equivalent to implicit waiver of the right of confidentiality.[109]

E. The Scope of Protection

Courts seem reluctant to define clearly the bounds of protection for information obtained in a psychotherapeutic relationship.[110] This reluctance has given rise to conflicting interpretations regarding the bounds of the psychotherapist-patient privilege.

For example, in *Chidester v. Needles*,[111] the Iowa Supreme Court reached a conclusion that would permit wholesale disclosure of all patient profiles, though only administrative data were at issue in the case.[112] In contrast, both the Sixth Circuit, in *In re Zuniga*,[113] and the Seventh Circuit, in *In re Pebsworth*,[114] permitted surrender of administrative records, but suggested they would not be as receptive to a request to disclose psychological profiles.[115] The District Court of Hawaii, in *Hawaii Psychiatric Society*,[116] protected all records from unwarranted seizure,[117] but left open the possibility of access to any documents reasonably requested.[118]

The confusion these decisions engender can cripple a therapeutic relationship. A patient's fear that all he says or all that is learned from what he says might be publicly revealed might cause him to hold back or withdraw from the therapy process.[119] A therapist's fear of governmental review of his records and the "highly personal and sensitive concerns of patients"

---

[109]*Id.*

[110]*See In re* Zuniga, 714 F.2d 632, 639 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

[111]353 N.W.2d 849 (Iowa 1984).

[112]*See infra* notes 124-127 and accompanying text for a complete discussion of the Chidester decision.

[113]714 F.2d 632.

[114]705 F.2d 261.

[115]*In re* Zuniga, 714 F.2d at 640-41; *In re* Pebsworth, 705 F.2d at 263.

[116]481 F. Supp. 1028.

[117]*Id.* at 1039.

[118]*Id.* at 1042.

[119]The Sixth Circuit Court of Appeals, in *In re Zuniga*, quoted Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952)):

> " 'The psychiatric patient . . . exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients . . . know that this is what will be expected of

therein[120] might result in his making less thorough notations[121] or in his keeping two sets of patient records, one less accessible than the other.[122]

Like actual disclosure, then, uncertainty as to the limits of protection can hinder effective therapy. Therapists need consistent guidelines and limits to prevent any unintended and unnecessary inroads on the privacy of therapeutic relationships.

1. Lack of Definition Encourages Unwarranted Intrusion. — Though the federal Medicaid statutes indicate a congressional concern for patients' confidentiality rights,[123] they offer little guidance in defining the limits of permissible intrusion. In the absence of congressional restraints, courts have at times unnecessarily eroded Medicaid patients' privacy and confidentiality rights.

For example, in *Chidester*, a county attorney obtained a subpoena for a psychological clinic's appointment books, ledger cards and copies of Medicaid billings for a fraud investigation.[124] The clinic refused to comply, invoking a physician-patient privilege.[125] Strictly construing statutory language, the Iowa Supreme Court found that the privilege extending protection to professionals "giving testimony" applied only to oral testimony; documents revealing therapists' knowledge were not protected by law.[126] Following decisions of other jurisdictions, the court

---

> them . . . . It would be too much to expect them to do so if they knew that all they say — and all that the psychiatrist learns from what they say — may be revealed to the whole world from a witness stand.' "

714 F.2d at 638.

[120] *Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1039.

[121] *Id.*; Commonwealth v. Kobrin, 395 Mass. 284, 292 n.15, 479 N.E.2d 674, 680 n.15 (1985).

[122] "Some clinicians . . . attempt to compromise between the demands of professional standards and those of the courts. Personnel at university counseling centers are sometimes told to keep detailed records at home and only minimal records at the office . . . ." Fisher, *supra* note 19, at 39, col. 4.

[123] 42 U.S.C. 1396a(a)(7) (1982). Congress has required that states formulate safeguards that protect, at a minimum, recipients' "(1) Names and addresses; (2) Medical services provided; (3) Social and economic conditions or circumstances; (4) Agency evaluation of personal information; and (5) Medical data, including diagnosis and past history of disease or disability." 42 C.F.R. § 431.305 (1985).

[124] *Chidester*, 353 N.W.2d at 851. No detailed records of diagnoses or prognoses of the patients were requested, but the subpoenaed ledger cards did bear coded diagnostic information. *Id.*

[125] *Id.* The clinic also asserted its patients' rights of privacy. *Id.*

[126] *Id.* at 852. The Iowa physician-patient privilege statute reads, in part:

> A practicing . . . mental health professional . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

could have found the limited information sought to be outside the scope of a physician-patient privilege, leaving intact protection for the more sensitive aspects of therapy.[127] In choosing to address a potential statutory construction problem, the Iowa Supreme Court unnecessarily compromised the confidentiality vital to a psychotherapeutic relationship.

In *In re Grand Jury Investigation*,[128] the state argued that the supremacy clause of the Constitution rendered Rhode Island's statutory privilege inoperative in the Medicaid fraud investigation of a physician.[129] The state supreme court agreed.[130] It held that the privilege statute must yield to federal law because, if implemented, it would prevent complete accomplishment of the statutorily expressed congressional intent to provide access to all necessary documentation.[131] Therefore, the court permitted disclosure of all records generated from the physician's relationships with Medicaid patients.[132] The court also indicated that further on in litigation, with a showing of materiality, relevance, or necessity, the investigating unit could obtain other related patient records.[133]

Though federal Medicaid documentation requirements do indicate a congressional intent to create an exception to patient privilege rules,[134] the *Chidester* and *In re Grand Jury Investigation* decisions, allowing unrestricted disclosure, unreasonably expand that exception. Certainly, verification of the rendering of services for which reimbursement is sought is necessary to the continued viability of the Medicaid program.[135] Patients must tolerate some infringement of their rights in the interest of accurate investigations ensuring appropriate expenditure of funds.[136] However, this infringement should be no greater than necessary for

---

[127] *See infra* notes 143-46 and accompanying text.

[128] 441 A.2d 525 (R.I. 1982).

[129] *Id.* at 528.

[130] *Id.* at 529.

[131] *Id.* at 531.

[132] *Id.*

[133] *Id.*

[134] 42 U.S.C. § 1396a(a)(27) (1982); 42 C.F.R. § 431.17(b) (1985).

[135] *Kobrin*, 395 Mass. at 290, 479 N.E.2d at 678-79.

[136] Camperlengo v. Blum, 56 N.Y.2d 251, 255-56, 436 N.E.2d 1299, 1301, 451 N.Y.S.2d 697, 699 (1982). Despite its dicta concerning limitations on disclosure, the Court of Appeals of New York permitted wholesale disclosure of a psychiatrist's patient records apparently because the doctor failed to claim that the scope of the subpoena was overly broad. *Id. See also Kobrin*, 395 Mass. at 293, 479 N.E.2d at 681. The Supreme Court, Appellate Division, of New York seems to have misinterpreted *Camperlengo* in Doe v. Kuriansky, 91 A.D.2d 1068, 458 N.Y.S.2d 678 (1983). Citing *Camperlengo* as support for the proposition that statutory privileges are inapplicable in a Medicaid fraud investigation, the court permitted full disclosure of Medicaid patients' records in a grand jury investigation of a provider-hospital's fraudulent practices. *Id.* of a provider-hospital's fraudulent practices. *Id.*

"effective oversight" of the Medicaid program.[137] Both the federal need for information and the patient's need for confidentiality may be adequately satisfied by prudent limitation of the scope of disclosure.[138] The federal disclosure requirements need not be construed as mandating the complete abrogation of a patient's privilege.

2. Workable Guidelines for Limited Access. — Before gaining acess to a therapist's documents, an investigating unit should be required to meet three criteria. First, it should make some showing of an " 'individualized, articulable suspicion' " of fraud.[139] An adequate showing might be made based on a "tip" (an informant's allegation of misconduct) or on a statistical analysis of the Medicaid billings of a randomly selected provider.[140] Second, the unit should show that the information is not reasonably available from another source.[141] Third, it should show that the information requested is clearly relevant to the issue before the court.[142]

In Medicaid fraud investigations of psychotherapists, the critical issue before the court is whether specific claimed services were rendered on the dates and for such lengths of time as a therapist has represented.[143] Courts generally agree that to verify rendition of services, fraud investigators must have access to patient identities and the dates and lengths of treatment sessions.[144] They also agree that release of this data does not violate patients' confidentiality interests.[145] Thus, they have concluded, this data is not protected by constitutional privacy rights or by statutory privilege.[146]

---

[137]*Camperlengo*, 56 N.Y.2d at 256, 436 N.E.2d at 1301, 451 N.Y.S.2d at 699.

[138]*See Kobrin*, 395 Mass. at 284, 479 N.E.2d at 674. *But see In re* Grand Jury Investigation, 441 A.2d 525. This case involved a physician (rather than a psychotherapist) seeking protection under a variation of the disfavored physician-patient privilege. *Id.* at 527.

[139]*Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1050.

[140]Fisher, *supra* note 19, at 39, cols. 1-2.

[141]Smith, *supra* note 48, at 36.

[142]*Id.*; Caesar v. Mountanos, 542 F.2d at 1075 (Hufstedler, J., dissenting in part).

[143]*Kobrin*, 395 Mass at 292, 479 N.E.2d at 680.

[144]*In re* Zuniga, 714 F.2d 632; *In re* Pebsworth, 705 F.2d 261; *Kobrin*, 395 Mass. 284, 479 N.E.2d 674; *see also* Simpson v. Braider, 104 F.R.D. 512 (D.D.C. 1985) (discussing the psychotherapist-patient privilege in a patient-litigant context); Henry v. Lewis, 102 A.D.2d 430, 478 N.Y.S.2d 263 (1984) (considering the effect of a physician-patient privilege on an insurance fraud investigation).

[145]*In re* Zuniga, 714 F.2d 632; *In re* Pebsworth, 705 F.2d 261; *Kobrin*, 395 Mass. 284, 479 N.E.2d 674; *see also Simpson*, 104 F.R.D. 512; *Henry*, 102 A.D.2d 430, 478 N.Y.S.2d 263.

[146]*In re* Zuniga, 714 F.2d 632; *In re* Pebsworth, 705 F.2d 261; *Kobrin*, 395 Mass. 284, 479 N.E.2d 647; *see also Simpson*, 104 F.R.D. 512; *Henry*, 102 A.D.2d 430, 478 N.Y.S.2d 263.

Those courts recognizing confidentiality rights agree that records of patient conversations are protected.[147] As the Supreme Judicial Court of Massachusetts reasoned in *Commonwealth v. Kobrin*,[148] knowledge of a patient's thoughts, emotions, or descriptions of conduct does not help an investigator verify rendition of a service.[149]

It is more difficult to ascertain the appropriate level of protection for information falling between the two extremes of administrative data and patient conversations. In *Kobrin*, the court attempted to define precisely the scope of protection for this information within the context of a Medicaid fraud investigation.

In that case, the Massachusetts fraud control unit had requested the subpoena of all patient records, medical histories, diagnostic and treatment records, worksheets, X-rays, X-ray records, test results, laboratory results, laboratory invoices, and records of medications administered or prescribed, including strength, dosage and regimen.[150]

The court permitted disclosure of records documenting the times and lengths of patient appointments and the fees charged.[151] It also permitted disclosure of documentation of somatic therapies — physical treatments such as medication or electroconvulsive therapy.[152] Investigators would need this information to verify the provision of physical services for which a therapist had requested reimbursement.

Though the court denied the state access to records of patient conversations, it provided that a judge could release to the state a physical description of those notations.[153] He could, "for example, inform the [state] that the psychiatrist's record of a particular date includes a one-page, handwritten report of a psychotherapy session . . . . If the medical record is devoid of such notations, the judge may so indicate."[154] Such a description could aid investigators, for example, in determining the validity of "tips" without needlessly encroaching upon a patient's privacy zone.[155]

---

[147]*Kobrin*, 395 Mass. at 295, 479 N.E.2d at 682; *see also* Miller v. Colonial Refrigerated Transp., Inc., 81 F.R.D. 741, 743 (M.D. Pa. 1974) (psychotherapist-patient privilege in a patient-litigant situation); *Henry*, 102 A.D.2d at 432, 478 N.Y.S.2d at 266 (physician-patient privilege in an insurance fraud investigation).

[148]395 Mass 284, 479 N.E.2d 674.

[149]*Id.* at 292, 479 N.E.2d at 680; *see also Hawaii Psychiatric Soc'y*, 481 F. Supp. at 1042.

[150]*Kobrin*, 395 Mass. at 285 n.2, 479 N.E.2d at 676 n.2.

[151]*Id.* at 294, 479 N.E.2d at 681.

[152]*Id.*

[153]*Id.* at 295, 479 N.E.2d at 682.

[154]*Id.*

[155]Often in an audit, a therapist's relatively innocuous appointment books and billing records are sufficient to prove or disprove any fraudulent practices. Fisher, *supra* note 19, at 39, cols. 1-2. Tips are less easily dispensed with. Arthur Friedman, of the office

The *Kobrin* court permitted the disclosure of patient diagnoses, treatment plans and recommendations, and psychiatrists' "observations of objective indicia of emotional disturbance . . . ."[156] Objective indicia, as defined by the court, may include but are not limited to: "disturbance of sleep or appetite; anergia; impaired concentration or memory; hopelessness; anxiety or panic; dissociative states; hallucinations; labile or flattened affect; or somatic symptoms such as headaches."[157] The court also provided for release of "objective accounts of the patient's past medical and psychiatric histories . . . ."[158]

Though the court did not explain its reasons for allowing disclosure of this more sensitive data, there are at least two possible justifications. First, the information might be valuable in determining the appropriateness or quality of care. However, as the *Kobrin* court noted, those issues are not a part of Medicaid fraud investigations.[159] Rather, they fall within the province of state licensing of health agencies.[160]

Second, with access to this detailed data, fraud investigators could perhaps better identify doctored records or nonexistent clientele — the more specific the notations on problems and future courses of treatment, the more likely a patient truly exists. Assuming this type of contribution could be made to a fraud investigation, that contribution still must be balanced with a patient's rights of privacy and needs for confidentiality before disclosure is permitted.

Release of diagnoses, treatment plans and patient histories would intrude significantly on an individual's privacy. As a practical matter, it is difficult to separate diagnoses, recommendations and indications of emotional disturbance from a patient's confidential communications.[161] After all, a therapist's notes and observations are simply information gained from a patient to which is applied professional knowledge and experience.[162] In weighing the sensitivity of this information, the potential for embarrassment or harm to the individual, and the value of an

---

of the Inspector General of the Massachusetts Department of Health and Human Services, hypothesized:

> [T]he psychiatrist's secretary, whom he's just fired, comes to you with a list of all the patients that he has never seen, but whose names have been written down in an appointment book and on billing cards . . . . And she tells you that she knows he keeps detailed notes on the patients he does see . . . .

Id. at 39, col. 2.

[156] *Kobrin*, 395 Mass. at 295, 479 N.E.2d at 681.

[157] *Id.* at 295 n.18, 479 N.E.2d at 681-82 n.18.

[158] *Id.* The court stated these histories could "include earlier hospitalizations, treatments and diagnoses but . . . not . . . patient conversations." *Id.*

[159] *Id.* at 292-93, 479 N.E.2d at 680.

[160] 42 U.S.C. 1396a(a)(33) (1983).

[161] *Simpson*, 104 F.R.D. at 521-22.

[162] *Id.*

effective therapeutic relationship to the individual and to society as a whole against the value of the information in verifying the rendition of therapeutic services, the patient's interests should mitigate against release of these records.

IV. Conclusion

Protection of a patient's confidentiality rights is vital to the establishment and successful development of a psychotherapist-patient relationship. Without assurances of confidentiality, a patient may not feel free to seek medical assistance or to discuss openly his problems with a therapist.

Access to patient records is vital to effective oversight of Medicaid providers. Without a therapist's records of services rendered, investigative units cannot efficiently and accurately verify the validity of Medicaid providers' claims.

If three criteria for disclosure are met, a proper balance between these seemingly irreconcilable interests can be struck with minimal harm to the needs of either party. First, fraud control units should be required to demonstrate a reason for suspecting fraud by a therapist under investigation. Second, units should be required to show that the information sought cannot be obtained from other sources. Third, disclosure should be strictly limited to information relevant to a determination that specific services were provided on the dates and for the lengths of time therapists have claimed. This last criterion can be achieved through *in camera* inspection and selective disclosure of those documents reasonably requested.

Administrative data and documentation of physical services rendered should be available to investigation units. These details are basic to a determination of the validity of therapists' claims and only minimally encroach on a patient's privacy. Similarly, physical descriptions of a therapist's notes, while revealing nothing about the nature of a patient's visit, may well be a valuable aid to affirmation of the rendition of therapeutic services on a particular date and for the length of time claimed.

However, publication of diagnoses, treatment plans, patient histories and "objective indicia of emotional disturbance" could subject a patient to embarrassment, humiliation or other harm, seriously violating his rights of confidentiality and autonomy and compromising his state-conferred psychotherapist-patient privilege. In contrast, this information would add little to a verification that services were provided where patient names, appointment schedules, billing records, notations of physical services and physical descriptions of session notes had been made available. The state interest in disclosure, then, should not overcome a patient's constitutional and statutory rights to confidentiality. This information should be protected from release.

In conclusion, both investigating units and patients must tolerate some compromise of their needs in Medicaid fraud investigations. By well-considered, consistent limitation of the scope of disclosure, courts can ensure that the Medicaid program retains its viability and provides a valuable public service without inflicting unwarranted harm on those who seek its assistance.

MARCIA TEMPLETON